

Exhibit E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NUMBER:

4 | IN RE: VALSARTAN PRODUCTS
LIABILITY LITIGATION

19-md-02875-RBK-JS

TELEPHONIC ORAL ARGUMENT
AND ORAL OPINION AND
RULINGS ON MACRO DISCOVERY
DISPUTES BETWEEN PLAINTIFFS
AND THE WHOLESALER AND
RETAILER/PHARMACY
DEFENDANTS [DOCKET NOS.
413, 478, 479, 501, 503]

9 Mitchell H. Cohen Building & U.S. Courthouse
10 4th & Cooper Streets
10 Camden, New Jersey 08101
11 July 06, 2020
11 Commencing at 1:30 p.m.

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1 (PROCEEDINGS held via teleconference before The Honorable Joel
2 Schneider, United States Magistrate Judge, at 1:30 p.m.)

3 THE COURT: This is Judge Schneider. We are on the
4 record in the Valsartan MDL, Docket Number 19-2875.

5 When I called in to this conference call, 40 people
6 apparently are on the line. I don't think we need to get
7 appearances from everyone who is on the line unless they want
8 to, but, certainly, we should get appearances from leadership
9 counsel, from the parties, and whoever is going to speak
10 today. And whoever is going to speak, as usual, please state
11 your name so the court reporter knows who's talking.

12 Start with plaintiffs.

13 MR. SLATER: Hello, your Honor. Adam Slater for
14 plaintiffs.

15 MR. HONIK: Good afternoon, your Honor. Ruben Honik
16 for plaintiffs.

17 MS. WHITELEY: Good afternoon, your Honor. Conlee
18 Whiteley for plaintiffs.

19 THE COURT: Defendants?

20 MR. GEOPPINGER: Good afternoon, your Honor. Jeff
21 Geoppinger, G-E-O-P-P-I-N-G-E-R, for AmerisourceBergen.

22 MS. JOHNSTON: And good afternoon, Your Honor. Sarah
23 Johnston for the retailer defendants and CVS Pharmacy.

24 MS. DAVIS: Your Honor, this is D'Lesli,
25 D-apostrophe-L-E-S-L-I, Davis, for McKesson, and speaking as

1 point today for the defendant wholesalers.

2 THE COURT: Does anyone else want to put their
3 appearances on the record?

4 MR. GOLDBERG: Your Honor, this is Seth Goldberg.
5 I'm on in my capacity as counsel for Walmart and, to the
6 extent necessary, I may speak on behalf of Walmart.

7 MR. STANOCH: Judge, this is David Stanoch,
8 S-T-A-N-O-C-H. I may speak at parts for plaintiffs.

9 MS. RICHER: And, your Honor, this is Kristen Richer
10 with Barnes & Thornburg, also on behalf of the retailers and
11 CVS. I may speak as to a few brief issues.

12 THE COURT: Does anyone else want to put their
13 appearances on the record now?

14 (No response.)

15 THE COURT: Thank you.

16 The Court has received all the parties' briefs and
17 has read them, as well as the accompanying exhibits and
18 declarations. Before we get into the oral argument on the
19 discovery issues in dispute, there's just a couple of
20 background questions that I have that I just wanted to
21 clarify.

22 Attached to Mr. Slater's April 13th letter as
23 Exhibits B and C are the requests for production of documents
24 directed to the wholesaler group and the retailer/pharmacy
25 group. Are those the documents that these discovery disputes

1 arise out of?

2 MR. STANOCH: Your Honor, this is David Stanoch for
3 plaintiffs.

4 The answer to that is yes, they are. There may have
5 been a few subsequent tweaks to the one with the retail
6 pharmacy defendants per meet-and-confer discussions, but for
7 purposes of today's call, I think the answer is yes, your
8 Honor can have Exhibits B and C in front of you, as necessary.

9 MS. DAVIS: Your Honor, D'Lesli Davis for the
10 wholesalers. That is correct, for wholesalers.

11 MS. JOHNSTON: And yes, your Honor, for the retailer
12 defendants, Sarah Johnston. I agree with Mr. Stanoch's
13 representation. There have been some changes to some of the
14 language, but nothing that would affect the arguments today.

15 THE COURT: So the issues that have been identified
16 in the letter briefs the Court received, it's the Court's
17 understanding that those are the only disputes that remain to
18 be decided before those requests for production are finalized.
19 Am I right?

20 MR. STANOCH: That would be -- this is David Stanoch
21 again, your Honor.

22 That would be plaintiffs' position, yes.

23 MS. DAVIS: Your Honor, D'Lesli Davis for the
24 wholesalers.

25 I believe that's correct; of course, assuming that

1 the draft that you're looking at is what comes from the
2 plaintiffs' ultimately, and with the note that the plaintiffs
3 are the ones who identified, you know, the issues that they
4 felt should be fought over as macro issues.

5 MS. JOHNSTON: And, your Honor, Sarah Johnston for
6 the retailers.

7 We've been working to, as I said, clean up a few
8 remaining issues. And the final set of requests will need to
9 be revised to reflect the Court's rulings today.

10 THE COURT: All right. So let me just put this in
11 perspective because I want to be clear on this.

12 With regard to the manufacturer defendants, we have
13 already entered a set of Court-approved document requests. Am
14 I correct that the fact sheets to the manufacturers need to be
15 finalized?

16 MR. STANOCH: Your Honor, David Stanoch again.

17 I believe that is correct, on both counts.

18 THE COURT: With regard to the two groups we're
19 dealing with today, the wholesalers and the retailers -- when
20 I say retailers, that includes the pharmacies -- is my
21 understanding correct that the parties have either explicitly
22 or implicitly agreed that these groups of defendants are just
23 going to respond to the requests for production and not
24 separate fact sheets or am I wrong about that?

25 MR. STANOCH: Your Honor, David Stanoch for

1 plaintiffs again.

2 I think that's not correct, your Honor. I think it
3 is the intention for the document requests for both of these
4 downstream defendant groups to be finalized and responded to,
5 and then, in short order, the parties finalize the defendant
6 fact sheets for each group as well.

7 THE COURT: What is the status of the discussion
8 regarding the fact sheets to be answered by these two groups
9 of defendants? Because I recall entering an order saying that
10 we have this group answering first, then 60 days, another
11 group, and then 60 days, another group. So what's the status
12 of the fact sheets directed to the wholesalers and retailers?

13 MR. STANOCH: Your Honor, David Stanoch for
14 plaintiffs -- plaintiffs again.

15 I believe there has been some ongoing discussions
16 with the retail pharmacy defendants. I think any discussions
17 are stalled or delayed, pending the ruling on these macro
18 issues with the wholesaler defendants. But I think it is our
19 view that we want any fact sheet issues with both groups to be
20 teed up, I believe your Honor said, by the end of July, unless
21 I'm mistaken, so that those facts -- all the fact sheets can
22 be resolved by then.

23 THE COURT: All right --

24 MS. JOHNSTON: Your Honor, Sarah Johnston for the
25 retailers.

1 The discussion of the fact sheets was tabled at the
2 recommendation of plaintiffs while we were waiting on the
3 Court's decision on the macro issues.

4 So I think that the last set of revisions to the DFS
5 were sent to plaintiffs maybe six or eight weeks ago. But we
6 have tabled those discussions, so we would need to pick those
7 back up, depending on how things go today.

8 THE COURT: What is going to be addressed in the fact
9 sheets that is not going to be addressed in the requests for
10 production directed to these two groups?

11 MR. STANOCH: Your Honor, David Stanoch.

12 I believe the requests we're talking about today are
13 sort of globally, litigation-wide, the documents and data the
14 plaintiffs are seeking, whereas the fact sheets to these
15 groups of defendants would be individual
16 plaintiff-specific-type questions, to the extent the data is
17 available, for those defendants to say, for example, which
18 particular valsartan products that individual plaintiffs might
19 have bought.

20 MS. JOHNSTON: Your Honor, for the retailers.

21 This is primarily going to be records like dispensing
22 records for an individual plaintiff, at least on the pharmacy
23 side.

24 THE COURT: And I think that will be affected by, I
25 think, the Court order where it indicated the number of

1 consumers whose records have to be searched. Am I right about
2 that?

3 MR. STANOCH: David Stanoch.

4 Yes, your Honor, I think that's correct.

5 THE COURT: Okay. Understood.

6 So if we decide these issues that we're going to be
7 presented with today in short order, these document requests
8 can be finalized, and shortly after that, we'll finalize the
9 fact sheets for these two groups, and once they're entered,
10 that will trigger 60 days to respond, 60 days to respond, 60
11 days to respond.

12 Just to tie the knot, finish the knot, what is the
13 status of the discussions of the fact sheets, finalizing the
14 fact sheets with the manufacturers?

15 MR. GOLDBERG: Your Honor, this is Seth Goldberg, and
16 I'll jump in on behalf of ZHP at this point.

17 I do know that my colleague, Barbara Schwartz, has
18 been in discussions with Marlene Goldenberg, counsel for
19 plaintiffs, to get that finalized. I expect it's close to
20 being done.

21 THE COURT: Fair enough.

22 All right. Turning to another --

23 MR. GOLDBERG: Your Honor, before you go -- yeah, I'm
24 sorry. This is Seth Goldberg again on behalf of Walmart.

25 And before you go on, I just wanted to clarify one

1 thing about what your Honor has said with respect to
2 finalizing the retailer document requests.

3 Walmart does have an issue with respect to two of
4 their requests, just two, and we're hoping to work through
5 that with plaintiffs and -- over the next week or two, and,
6 hopefully, can meet and confer with plaintiffs. We have
7 invited plaintiffs to do that. So I just want to be clear
8 that, at least for Walmart, there is a specific dispute as to
9 two requests.

10 THE COURT: Mr. Goldberg, let me tell you the Court's
11 position because this was raised in one of Mr. Slater's
12 letters. We are finalizing these requests for production
13 hopefully today, but no later than Thursday.

14 As far as the Court is concerned, the only disputes
15 remaining are those disputes in the letters that the Court
16 received. The Court will not address any other issue other
17 than the issues that have been raised in the letters submitted
18 to the Court. It was represented in those letters that those
19 were the only disputes remaining with regard to the requests
20 for production.

21 The Court is not going to address individual
22 objections by individual retailers and wholesalers. They had
23 the opportunity to raise those issues. The time has passed,
24 and the Court will only address the issues in the letters.
25 There is not going to be weeks of meet and confer on this. I

1 expect to enter these requests for production either Thursday
2 or no later than Friday.

3 MR. GOLDBERG: Yes, I understand. I understand, your
4 Honor. I don't mean to say there is an objection to the
5 requests as much as how Walmart envisions responding to two of
6 the requests, and that is an issue that we intend to meet and
7 confer with plaintiffs on. And I don't want to derail this,
8 you know, your Honor getting to the macro issues, but maybe
9 it's something we can pick up after the macro issues. But
10 there are two -- there are two requests that do create a
11 significant and demonstrable burden on Walmart, and Walmart
12 would like the opportunity to meet and confer with plaintiffs
13 about a potential compromise to alleviate that burden.

14 THE COURT: If you could work it out with plaintiffs,
15 that's fine. You have until Thursday. I said what I said.
16 It was represented to the Court that the only remaining
17 disputes are those in the letters, and those are the only
18 issues the Court is going to address.

19 Let's get to the letters. I'd like to start by just
20 framing the issues in dispute, and we'll deal with one issue
21 at a time.

22 The first issue that I would like to address is --
23 these are my words -- this tracing issue involving the
24 wholesaler defendants. And I want to make sure before we get
25 into the argument that we all use a consistent terminology,

1 and we know what we're arguing about.

2 As I understand the issue, plaintiffs, in effect,
3 you're asking the wholesalers to produce, during the relevant
4 time period, all of the information that they receive from
5 their upstream supplier, whether it was a manufacturer or the
6 finished dose manufacturer, and then you're asking the
7 wholesalers to produce all information that was provided to
8 the pharmacies, or that documents for sales -- I said
9 pharmacy. I meant retailers. And that's the Court's
10 understanding of what this tracing dispute is. Am I phrasing
11 it correctly?

12 MR. STANOCH: Your Honor, David Stanoch for
13 plaintiffs.

14 Yes, I think that's a fair characterization.

15 MS. DAVIS: Judge, this is D'Lesli Davis for the
16 wholesalers.

17 I think, generally speaking, as we've had our meet
18 and confers, that's correct.

19 The specific language of the request, though -- and
20 this goes to both upstream and downstream -- is documents
21 sufficient to identify date of purchase or sale, quantities of
22 purchase or sale, NDC number, lot number, and expiration date.
23 And then there are two caveats: To the extent you maintain
24 that in your ordinary course of business, and to the extent it
25 can be collected by a reasonable search. So maybe it's a

1 little narrower than what you say, and, of course, the
2 wholesalers would say that the course of business way that it
3 is maintained in a trustworthy manner -- and that could be
4 done by a search. I'm not sure we're ready to concede it's
5 reasonable -- would be the output through that exemplar that
6 we showed you. And that does not include lot or expiration
7 date information, certainly, all the way downstream to
8 retailer.

9 THE COURT: I want to be clear on this because it
10 will work to avoid confusion and a dispute in the future. If
11 plaintiff said give me all the information -- I'm trying to
12 phrase it so that there is no misunderstanding about what
13 we're talking about.

14 When the manufacturers supply the wholesalers, when
15 they sell the wholesalers' product, valsartan-containing drug,
16 plaintiffs want all the documents that will memorialize that
17 transaction. Is that your understanding of what they want?

18 MS. DAVIS: So, no, your Honor. I think that they've
19 crafted their RFPs -- and you can look at that, Exhibit C, I
20 believe it is -- and see that they ask for exemplars of the
21 documents that would be sort of the shipping documents or
22 these documents that would actually show the types of
23 information -- the types of all information that you get
24 upstream, the types of all information you send downstream.

25 When we talk about RFP Number 1 and Number 3, which

1 are two of the four that are in dispute for the Court today,
2 we're just talking about documents sufficient to identify
3 quantity, units, NDC, batch, lot, and expiration date.

4 It is RFP Number 6 that they contemplate -- they knew
5 that would be burdensome, right, to go get all of the
6 underlying source documents. So what they were trying to do
7 is say give us this detail of these key tracing elements, if
8 you have them in the ordinary course of business, that you can
9 get via a reasonable search, which would be a database search.
10 That's 1 and 3. And then show us what those underlying
11 documents look like by producing an exemplar, and they say of
12 the manufacturer-included packaging and labeling and shipment
13 documents and similar information, and they do the same for
14 downstream, if that makes sense.

15 THE COURT: So, for example, if a wholesaler makes a
16 purchase from a manufacturer, presumably -- I'm just surmising
17 now. I don't have any personal knowledge -- there is an
18 invoice; there is a bill of lading; there's maybe -- I don't
19 know -- labeling information, packaging information. Is it
20 your understanding that that is what is encompassed within
21 plaintiffs' requests?

22 MS. DAVIS: That's Request 6 which is not before the
23 Court right now because they only want an exemplar of those
24 specific documents. And we scrambled to try to get them this
25 week, since that sort of blew up last week, and had been

1 waiting, thought that would happen when the RFPs ultimately
2 got served. We're trying to get the universe of that
3 correctly. We're in the process of getting from each of the
4 wholesalers those exemplar documents that will ultimately be
5 responsive to 6 upstream, 8 downstream.

6 The RFPs 1 and 3 before you now are much more narrow.
7 They are documents sufficient to identify the details of the
8 purchases from upstream to the extent that they reflect date,
9 quantity, NDC number, lot, or expiration date, and documents
10 to -- sufficient to identify that same information for the
11 sales to the retailers, and only to the extent, you know, that
12 those can be collected by a reasonable search.

13 MR. STANOCH: Your Honor, this is David Stanoch for
14 plaintiff. May I address this?

15 THE COURT: Sure.

16 MR. STANOCH: Thank you.

17 I think it's important to know, Judge, that documents
18 sufficient to show I believe obviously would be that there is
19 new data showing that for all the transactions, and then, yes,
20 we'd have a few exemplars to show what the physical copies of
21 things look like, to back up the data.

22 If they don't have data to show what we're asking
23 for, then the documents sufficient to show might be something
24 else besides the incomplete data that they say they have and
25 haven't given to us yet.

1 I know this is akin to the argument we had with the
2 ZHP manufacturer defendant, your Honor, where we said give us,
3 you know, the full data for the full period for your sales.
4 They said they didn't have it for a majority of the time
5 period. The only documents sufficient to show in that
6 instance, Judge, they said were hard copy invoices, and that's
7 what your Honor directed them to produce.

8 MS. DAVIS: Judge, D'Lesli Davis.

9 It's a little bit different for wholesalers because
10 there is -- Congress has acted on what information, that is
11 tracing information, particularly lot information is the best
12 example, needs to be passed on. And so this whole debate
13 arises out of plaintiffs' frustration that Congress has said,
14 A, wholesalers do not need to track product down to the
15 retailer; B, wholesalers do not track or trace down there; and
16 C, Congress has said any action inconsistent with that
17 wholesaler exemption on tracing downstream is preempted; and
18 any requirement that there be additional recordkeeping -- yes?

19 THE COURT: Counsel, hold on. You're getting into
20 argument now, which we'll get into. I understand the
21 argument. I just -- this is just background. We're trying to
22 frame the issue. And you'll have time to make your argument
23 about what the statute says and doesn't say. But I'm just
24 trying to frame the issues to avoid a dispute in the future
25 because once the Court rules, I don't want to have another

1 argument about what was encompassed within the request.

2 MS. DAVIS: Fair enough, your Honor. And this is
3 Ms. Davis. Apologies for getting ahead of ourselves.

4 But I think that on the face of the request, this is
5 fairly simple and fairly standard language. The plaintiffs
6 came in and said we need you to do a reasonable search of your
7 computer systems to get us line items, a summary of the line
8 items of your purchases from the manufacturers, in these four
9 or five datapoints, and the same thing for below. And that's
10 what we're fighting about.

11 And then in their other requests that we're not
12 fighting about, they said get us an exemplar of each of the
13 underlying documents.

14 So it is the output of the computer systems
15 reasonable search, the ordinary course of business, kept to
16 reflect the items they seek for each of those purchases or
17 sales.

18 THE COURT: In reviewing the declaration, one of the
19 types of documents that was mentioned was this T3 document. I
20 think you know what I'm referring to.

21 MR. DAVIS: Yes, your Honor.

22 THE COURT: If the Court grants -- if the Court
23 grants plaintiffs' request, for example, would the T3 document
24 be produced? Is it in the --

25 MS. DAVIS: No.

1 THE COURT: -- scope? No?

2 MS. DAVIS: No. An exemplar of the T3s would be
3 produced, but that would prove that from above, on the T3s,
4 manufacturers to wholesalers contain lot information, and then
5 wholesalers to retailers that exemplar will show do not
6 contain lot information. But an exemplar would prove what
7 we're saying to be true about the fact that tracing doesn't go
8 downstream.

9 THE COURT: And then plaintiff can do whatever they
10 want with the information that's provided on the T3 because
11 their consultant/expert seems to think that even without the
12 lot number, they can do some traceability, right?

13 MS. DAVIS: I don't think I agree with --

14 THE COURT: You may disagree with the expert, but
15 that's what the expert says, right?

16 MS. DAVIS: Well, he can do whatever he wants to with
17 the exemplar of the T3, but there is not an issue before the
18 Court that we are being even asked to produce all T3s. So we
19 would have -- so that would also be outside the scope. In the
20 same way that you were talking to Mr. Goldberg, that would be
21 outside the scope of plaintiffs' failure to demand those or
22 ask for those and failure to brief them as macro issues.

23 THE COURT: I know, but isn't plaintiff proceeding in
24 a prudent way by saying, okay, give us the data, give us
25 examples, we'll take a look at the examples, run it by our

1 consultants to see if it's helpful or not, and then if it's
2 helpful, are you going to be surprised if they come back and
3 ask for all of it?

4 MS. DAVIS: Well, I am in light of the process that
5 the Court has put in place. Right? Which is that these
6 issues are to be teed up now. I've never been aware that we
7 were fighting a battle over whether we would have to produce
8 all, you know, T3s. Is that conceivable? Yes. I think in
9 the last phone call, after they got our reply brief, I was
10 threatened with that and more. But it's simply not how
11 this -- my understanding was that the process was going or the
12 issues that have been briefed for the Court.

13 THE COURT: Well, I said what I said. It seems to me
14 that plaintiff is proceeding in a very prudent fashion.
15 Before requiring -- asking the wholesalers to produce seven or
16 eight, nine years of T3s, for example, they want a sample, and
17 they'll determine for themselves if it's helpful or not. And
18 if it's helpful, I'm not going to be surprised if plaintiffs
19 come back and say give us seven or eight, nine years of data.
20 Nor should the wholesalers be surprised.

21 MS. DAVIS: Your Honor --

22 THE COURT: But that issue is not before us now, so
23 we don't have to deal with it.

24 One of the questions I had is, you had mentioned,
25 counsel, that you're working on getting exemplars to the

1 plaintiffs. Today is July 6th. We've been arguing about this
2 for months. Plaintiff has been asking for exemplars for
3 months.

4 MS. DAVIS: But they haven't, your Honor. They
5 haven't, your Honor. This was an RFP, two RFPs that have been
6 on hold, pending our fight over the very specific issues that
7 are before you now. It was only after receiving the reply
8 that they began to take the position that they have been
9 asking for exemplars for months. They had decided that
10 putting that request for exemplars in a request for production
11 and waiting until they served that request for production was
12 the way they wanted to handle it. And so once they started
13 jumping up and down about the exemplars, we scrambled to try
14 to do what we could with 4th of July here, and haven't been
15 able to get a full representation, but we were not aware that
16 they thought they needed exemplars earlier. That was a on
17 hold, agreed to RFP.

18 THE COURT: Okay. One of the cases that was cited, I
19 think in the plaintiffs' papers, is *Androgel*, if I'm
20 pronouncing it right, antitrust litigation from the Northern
21 District of Georgia in 2012. In that case, the Court ordered
22 the same wholesaler defendants that are at issue in this case
23 to produce all "purchase and sales data," "purchase and sales
24 data" regarding particular drugs. Is that the same or
25 different than what plaintiffs are asking here? The

1 production in that case, "purchase and sales data," is that
2 different than what plaintiffs are asking for here?

3 MS. DAVIS: I'm not sure that I have enough detail
4 from that case to know the specifics of systems and particular
5 parameters, but the three cases that the plaintiffs cite for
6 authority that we must turn over sales and pricing information
7 are two antitrust cases and one competitive pricing case. So
8 I understand the temptation to think of these things and these
9 sales and pricing data as something that just must be turned
10 over in big cases, but wholesalers reside in a different
11 place, and the relevance, which has never been articulated in
12 this particular case, where the real -- the image information
13 is, A, within the custody of the plaintiffs, and the very same
14 information that plaintiffs seek from this computer system is
15 being produced by the manufacturers and the retailers. We
16 have got a real burden duplication issue as well.

17 THE COURT: All right. Let me -- I don't want to
18 conflate the two issues that we have to deal with with regard
19 to the wholesalers.

20 The what I call the plaintiffs' requests for tracing
21 discovery, is that different than purchase and sales data?

22 MS. DAVIS: I don't think so. The way we think of
23 it, and what I think you would call tracing information, and
24 the items that we believe the manufacturers are producing and
25 the retailers are producing, is this computer output of the

1 date and the detail of a purchase from a manufacturer, and
2 there is a component of that that has the gross price paid by
3 wholesalers, and downstream, the gross purchase price paid by
4 the retailers. That would all be within the tracing, even
5 though there is pricing information in there.

6 The second category then is sort of the profit or net
7 price piece, which is not contained within that computer
8 system, and, in fact, does not exist.

9 THE COURT: Mr. Stanoch, turning to you for a moment,
10 and maybe we could just get right to the point. On this first
11 issue regarding the requests for tracing discovery, if the
12 Court grants plaintiffs' request, is what you're asking for
13 the Court to order that document requests 1 and 3 have to be
14 responded to?

15 MR. STANOCH: Your Honor, David Stanoch.

16 Yes, 1 and 3 would need to be responded to, correct.

17 THE COURT: And are requests 2 and 4 the second issue
18 that we're going to deal with after we get through with the
19 tracing issue?

20 MR. STANOCH: Correct, your Honor. 2 and 4 are
21 simply the pricing aspect that would accompany the tracing
22 data, but we broke it up separately and that's the way it is
23 briefed.

24 THE COURT: Okay. So let's now get to the meat of
25 it. Let's argue the discoverability of the information

1 requested in requests 1 and 3. We'll deal with the tracing
2 issue first, and then we'll get to 2 and 4 after we're done
3 with this. So this is -- well, let me start this way.

4 Defendant, can it be reasonably disputed that for
5 discovery purposes, it's a relevant issue for plaintiff to try
6 and find out the source that each of the plaintiffs -- where
7 they got their valsartan from, to trace it up the supply
8 train, just as a general matter? Can it reasonably be
9 disputed that tracing information is relevant for discovery
10 purposes?

11 MS. DAVIS: Yes, your Honor, it can, because it does
12 not, A, tend to prove or disprove an element of plaintiffs'
13 claims, what sale or purchase was touched by the wholesalers.

14 THE COURT: I don't understand how you could make
15 that argument. I'm just totally flabbergasted that you could
16 make that argument. Here's why.

17 MS. DAVIS: Here is the truth -- I'm sorry, your
18 Honor.

19 THE COURT: Hold on, hold on.

20 Here's why. If the manufacturers are going to admit
21 that every single piece or pill or tablet or dosage of
22 valsartan contained whatever contaminate they found in the
23 test, this would be very, very easy because then plaintiffs
24 wouldn't have to prove they took a contaminated pill. I don't
25 think that's the position the defendants are taking.

1 They're taking the position, as I understand it, that
2 not every bit of valsartan was contaminated. They're going to
3 start with only the recalled valsartan was contaminated. What
4 does that mean? That means that defendants are going to argue
5 that there was contaminated and uncontaminated valsartan on
6 the market. Right?

7 MS. DAVIS: Yes, your Honor.

8 THE COURT: In order for a plaintiff to recover,
9 don't they have to show that they took the contaminated
10 valsartan? And how can they prove that, unless they can trace
11 it?

12 MS. DAVIS: So, your Honor, that is the stated,
13 argued relevance of the information. The problem is is proven
14 by the evidence before you, the proven personal knowledge
15 evidence, not the speculation evidence from the plaintiff's
16 expert, but the proven, personal-knowledge-based evidence from
17 people within the companies is that there is no information
18 that the wholesalers maintain that will demonstrate which lots
19 went where downstream. So what we have is whole- -- sorry --
20 manufacturers producing documentation that will show what lots
21 they sold to wholesalers.

22 THE COURT: Right.

23 MS. DAVIS: So you go to the next step. Does
24 anything that the wholesalers have assist anyone in
25 determining what lot went where? And the proof in the record

1 before you, Judge, is that the answer is no, and it's no
2 because Congress said that wholesalers don't have to slow down
3 the supply chain to take the time to enter that information
4 downstream.

5 So we come back to the relevance. If the documents,
6 eight years of computer searches that will take the time and
7 the money that the declarations reflect to create, will not
8 assist the plaintiffs with the one reason they say they want
9 them, product tracing. There is no relevance, and there is
10 not a record before you of relevance or proportionality or, to
11 the extent that we're in your *Major Tours* analysis, reasonable
12 accessibility and good cause.

13 And in response to the proof that the wholesalers
14 have put in front of the Court, what you get is simply from
15 the plaintiffs there can be little question this data is
16 highly relevant. It's at the core of what needs to be
17 produced, it's fundamental, it's a basic obligation. But when
18 the rubber hits the road, they just speculate, and they say
19 one of two things. They say either the wholesalers are lying,
20 there is lot information there, or, heck, if you haven't kept
21 lot information -- and they say this in their papers but
22 they've literally said it in the meet and confers -- then
23 you're going to be punished. You have to produce all this
24 stuff anyway. Because even though we can't articulate and our
25 plaintiffs' expert fails to articulate one use we would make

1 of date information or quantity information or NDC
2 information, we should be able to look at that and we'll
3 figure it out later. And that's the definition of a fishing
4 expedition. Never mind that there is no wholesaler wrongdoing
5 alleged. If this is simply to get to product identification,
6 apart from an assertion that wholesalers were at fault, it
7 doesn't get them there. It's not relevant. And if you find
8 that it's marginally relevant, it can't possibly be
9 proportional when the plaintiffs can't tell you exactly how
10 they're going to use it or what it will prove.

11 THE COURT: Is it the wholesalers position that in
12 the absence of a lot number, it's impossible for the
13 plaintiffs to trace up the supply chain from the retailer to
14 the wholesaler, to the finished dose manufacturer, to the
15 manufacturer?

16 MS. DAVIS: Yes. And I think our declarations say
17 that literally. We can't think of a way to do it, so the
18 burden is back to plaintiffs to tell us how they would do it,
19 and they haven't and they can't.

20 To get factual for just a minute, what happens is a
21 manufacturer manufactures a drug and they stick it -- I'm
22 generalizing here, but they stick it into two types of
23 bottles. One is a bulk bottle. It's got 500 pills in it,
24 it's got a thousand pills in it. Another type of bottle is
25 the small. Maybe it's got 30 or 90 pills in it. So on those

1 pill bottles, they stamp the lot number -- and this will all
2 change in 2023 when all these systems will be speaking to each
3 other, but they can't right now. They put a sticker on there
4 that has the lot and the expiration date on it, and put it on
5 that T3 and it comes down to the wholesaler. The wholesaler
6 gets these on a pallet, a pallet of 25 500 bottles or 45 30
7 pill bottles. They break up that pallet immediately, and they
8 put those pills at the distribution center on the shelves in a
9 way that you would take the, you know, the oldest out first.
10 They do not stop and enter manually into any of their
11 systems -- and Congress says this is exactly the way it should
12 be because they don't want to slow down the supply chain.
13 They don't take time and manually enter that into a system.

14 So then when the retailer orders some of these
15 bottles, take the 500 bottle, the wholesaler ships that down
16 to the retailer without lot information, without -- other than
17 what is on the bottle, right? But that never gets input into
18 any sort of system so it's no longer traceable. And then that
19 goes to a distribution center for the retailer, who sends it
20 somewhere, or if it went straight to that retailer, if it's a
21 bulk bottle, they take those 500 pills and start putting them
22 into those yellow 30-pill bottles.

23 So there are really two levels that we lose the
24 traceability. We lose it when we get it from the
25 manufacturers, and then as things are disbursed further down

1 the chain, they get lost there. So the best place to find it
2 is in the plaintiff's hands, with the bottle that he got.

3 THE COURT: Plaintiffs, I have and you have seen a
4 declaration from plaintiffs' consultant that disagrees with
5 the declarations that the three wholesalers have submitted.
6 Plaintiffs' consultant says there are many ways to link a
7 dispensed product to a lot besides the lot number.
8 Plaintiffs' expert says that the wholesalers have more than
9 enough information in their inventory systems to be used to do
10 the tracing and that the wholesalers are well poised to
11 identify how best to do this linking. I can go on and on and
12 on.

13 I've read the affidavits, the declarations from the
14 affiants of the three wholesalers. They say the exact
15 opposite. They say it's impossible, that no such data exists,
16 and that -- exactly what you said, that without the lot
17 numbers, they can't do the tracing.

18 Now, you're asking the Court to accept as fact what
19 your affiants have stated in their affidavits. What is the
20 Court to do if we have this contrary declaration? If this
21 were a summary judgment, the summary judgment would be denied.
22 So what is the Court to do, if the plaintiffs have made their
23 case -- of course, the defendants disagree with them. Why am
24 I bound to accept as gospel what the defendants' affiants say
25 when it's disputed by plaintiffs' consultant?

1 MS. DAVIS: Because it's based on personal knowledge
2 of the recordkeeping of the wholesaler defendants, number one.

3 Number two, because the plaintiffs' expert is
4 speculating on its face -- on the face of the declaration.

5 And, number three, because the plaintiffs' expert
6 never does what I think the Court anticipated was his
7 obligation, and that is to say, well, if there is not lot
8 information, I would use X, and I would use it in this manner
9 to try to recreate some form of traceability.

10 So we say, on personal knowledge, we don't have lot
11 information. He says, surely you have lot information
12 downstream, based on speculation. He does not go another step
13 further and say, here's another way to get there.

14 And so when you have an expert, a consulting expert
15 that may have time in the industry but not time at
16 wholesalers, I don't think, and he is guessing what must be
17 there, and you have people with personal knowledge of the
18 systems and the data saying it's not there, and there is no
19 step further, no creation of a particular use of a particular
20 datapoint, I would submit, on summary judgment, that expert
21 wouldn't carry them --

22 MR. STANOCH: Judge, I thought that question was
23 addressed to me, your Honor. I'd like to --

24 THE COURT: No, no, no, no. Mr. Stanoch, I'll get to
25 you.

1 MR. STANOCH: Thank you, Judge.

2 THE COURT: Defendant, let me ask you another
3 question. Okay?

4 MS. DAVIS: Yes.

5 THE COURT: We know what happened with the discovery
6 of the contamination. We know there was some recalls. So the
7 FDA recalled a specific lot. I don't have a number in front
8 of me. It could be any number. Make up a number. The FDA
9 goes to McKesson, the FDA goes to AmerisourceBergen, the FDA
10 goes to Cardinal Health and says we know this lot number was
11 recalled. Can you tell us if this lot number was in your
12 hands? Are you saying that the wholesalers couldn't find out
13 that information?

14 MS. DAVIS: No, but I'm saying it's not done the way
15 that people might guess that it's done.

16 The wholesalers, McKesson specifically -- I can speak
17 very particularly for McKesson -- does not track recalls by
18 lot number. They use the NDC number. So Teva's 90-pill
19 bottle of Valsartan Version 1 at this dosage has an NDC number
20 that's uniform and used by everybody. So what happens when
21 there is a recall is McKesson sends out an alert to its
22 distribution centers and says, hey, this lot of this NDC
23 number is on recall, and then an employee goes and
24 individually hand inspects the area of the distribution center
25 where that NDC number sits, looking at the pill bottle stamp

1 the manufacturer put on it, to pull the suspect -- it's not
2 suspect, that's the wrong language -- but to pull the recalled
3 product out and put it in quarantine for reclamation.

4 THE COURT: How about this question, hypothetical, of
5 course. A prescription is filled at a pharmacy. It doesn't
6 matter which one. The consumer -- and on the label, it has
7 the NDC number and it has the lot number, on the label. The
8 retailer provides the lot number. They open the bottle, there
9 is a foreign object in the bottle. The FDA comes in and says,
10 we got to take all of these lot numbers off of the market.
11 The FDA goes to the three wholesalers and says, here's the lot
12 number, take all of this off of your shelves. Are you saying
13 that the wholesalers couldn't do that?

14 MS. DAVIS: No, I'm saying they can do that, but they
15 would be guided by the NDC number. So the contaminant is in
16 Teva NDC number -- Number 1, Lot Number A. So that's going to
17 make that information from the FDA or from whomever, however
18 it comes to be recalled, if it's a manufacturer recall, it's
19 going to be sent out to the McKesson distribution centers by
20 NDC Number 1, Teva Number 1, go look on your shelves for Teva
21 Number 1, and then, when you're in the area of Teva Number 1,
22 check to see if we have any of this lot, and if we do, do
23 whatever you're instructed to do.

24 MR. JOHNSTON: And, your Honor, Sarah Johnston, just
25 briefly, to correct something that was said just a moment ago.

1 The pill bottle that the consumer would have in his
2 or her hands would not have a lot number on it. It would have
3 the NDC. So the tracing that we're discussing is related to
4 the NDC. But, by and large, that pill bottle from a pharmacy
5 is not going to have a lot number, you know --

6 THE COURT: Well, Ms. Johnston, I have to
7 respectfully disagree with you because I just walked over to
8 my dresser to look at the bottles of the prescriptions I take
9 for my high blood pressure. And the first one I picked up has
10 a lot number on it.

11 MS. JOHNSTON: Well, your Honor, I understand that --

12 THE COURT: And another one has a -- another one has
13 a batch number on it.

14 (Crosstalk.)

15 MS. JOHNSTON: Which is why I qualified the response
16 to say that there are certain smaller pharmacy chains that
17 do -- that do print lot numbers or do maintain lot numbers,
18 but the -- and, again, this is not something -- an
19 issue that's --

20 THE COURT: From CVS.

21 MS. JOHNSTON: That's a surprise to me, your Honor,
22 and an experience that is not reflected in what -- what I've
23 recognized socially or experienced with my own client. But I
24 appreciate that.

25 I wanted to jump in though, because it is and

1 continues to be an issue for the pharmacies that that -- while
2 I can't speak to your own personal experience, your Honor,
3 that's not something that is traced at the consumer level, and
4 that is what we have communicated to plaintiffs on numerous
5 occasions.

6 THE COURT: Luckily for me -- luckily for you, I'm
7 sorry, you're not as old as me so you don't have to take these
8 prescription medicines yet. Someday you might be that old.

9 But, anyway, Mr. Stanoch, I'm sure you're chomping at
10 the bit to say something. Do you want to be heard?

11 MR. STANOCH: Yes, your Honor. Only briefly. This
12 is David Stanoch, for the record.

13 Your Honor, one of your questions really hit the nail
14 on the head, that the information -- the traceability
15 information is obviously relevant. And I've heard Ms. Davis
16 reference proof, that she was getting factual, talking about
17 evidence.

18 Judge, we're talking about the facts that I am
19 allowed to get to develop the record to get factual to argue
20 these things. I don't have to accept Ms. Davis's
21 representations on this call about what does and does not
22 exist. That's not how the litigation works.

23 I'm entitled to the information, in whatever form it
24 is, and then I can ask questions of her declarants about the
25 information to see what other information might be out there.

1 That -- there are a number of examples I can go into, of many,
2 your Honor. I mean, Ms. Davis's declarant, Mr. Mooney, says
3 they don't have it, she says they don't have it. We have
4 public information where he makes a statement that product
5 identifiers are important to recall is the quote -- recall a
6 portion of a batch made during some time frame of one day at
7 one plant, end quote.

8 The facts are necessary for us to get in the first
9 instance before we can even have these next questions.

10 And to say that our expert is speculating, our expert
11 cites publicly available information from these very
12 defendants and what they keep, and I can't have my -- it's
13 prejudicial to have my expert faulted for, quote, speculating,
14 when they won't give me a single fact or document or data that
15 we can actually look at. Ms. Davis says, well, the expert --
16 it was incumbent on the expert to come up with the alternative
17 method now. I don't even have the information from them that
18 I could give to my expert for him to go ahead and to look at.
19 We're three steps ahead of where Ms. Davis and these
20 defendants think we are, Judge.

21 THE COURT: What do you say about counsel's
22 statement, as I understood it, that you didn't ask for
23 exemplars until, what, a day or two ago?

24 MR. STANOCH: Your Honor, I'm not going to rehash
25 that from the other week. We think it's clear we wanted

1 exemplars for awhile. Of course, it's one of the specific
2 document requests in the set that we prepared. That's the
3 formality of doing it. We wanted exemplars or samples from
4 any of these defendants. Not a single one of these
5 defendants, your Honor -- we served the draft request December
6 2019, seven months ago. None of them have released any
7 documents to date. No exemplars, no documents, no data. We
8 have two lines of data that McKesson finally gave us that we
9 saw for the first time when they served their letter briefs
10 the other month. That's it.

11 So the idea that we didn't want these exemplars or
12 data or samples or terminology, I will just say that I
13 disagree with that. And, regardless, your Honor, they can
14 come to us to let us know the name of what all the fields and
15 data and forms are. They never -- she's talking about T3
16 reports. Judge, we never heard about that until the other
17 week. We don't need to guess what forms or data or records
18 that they may have.

19 MS. JOHNSTON: Judge --

20 MR. SLATER: Your Honor, it's Adam Slater.

21 I just want to add one thing to what Mr. Stanoch said
22 before, and then defense counsel can respond, because I happen
23 to have in front of me an excerpt from the February 26, 2020,
24 transcript, on Page 15. I don't have the pages enlarged
25 because the excerpt was e-mailed to me a moment ago. But

1 there was a specific discussion about getting the exemplars
2 from the wholesalers and retailers. And I'm quoting from your
3 Honor saying: "I think that's a great idea to help advance
4 the ball to get exemplar documents, and I would encourage the
5 wholesalers and retailers to do that. Experience shows that
6 if we can get these issues resolved once and for all early, it
7 saves so much time," et cetera. So I just wanted to make it
8 clear that this wasn't something that was raised a week or two
9 ago. I don't know how counsel can say that. And I'm reading
10 from again the February 26, 2020, transcript at Page 15. I'm
11 trying to leave this to Mr. Stanoch, but I thought it was
12 important to add that to the record.

13 THE COURT: Am I correct, though, that there were
14 exemplars produced by the retailers?

15 MR. SLATER: I will leave it to Mr. Stanoch to answer
16 that.

17 THE COURT: Or at least they have agreed to produce
18 exemplars.

19 MR. SLATER: There has been a lot of discussion about
20 what may or may not be produced, but in the long -- in the
21 months and months and months of going back and forth, we don't
22 have what we need, I think is the bottom line. There may have
23 been something produced. I will leave that to Mr. Stanoch to
24 respond. I don't recall seeing anything, but it's possible.
25 But at this stage, to be in July, and not have a full set of

1 exemplars, is, you know, from our perspective, it's, you know,
2 obviously frustrating.

3 MS. DAVIS: Judge, putting aside the -- this is
4 D'Lesli Davis.

5 Putting aside the exemplars for a moment, though, the
6 Court ordered that the plaintiffs had the burden to get an
7 expert -- who was going to have a hidden name and we weren't
8 going to be able to attack credentials or who he was, that was
9 going to be in camera -- but he had to carry the burden of
10 relevance and proportionality. And now that they tried to do
11 that, and we responded with -- and it had to be an admissible
12 proof, and the judge instructed us you have to prove up your
13 burden too, and you have to counter this in admissible
14 evidence. And now that we've done that, they say, oh, this is
15 crazy. How can they expect us to put any of this proof forth
16 when we haven't even gotten to do discovery yet? So this was
17 the process, this was the burden, this is the D-Day, and they
18 haven't created a sufficient record of relevance, not to --
19 and we haven't even talked about the burden stuff -- but of
20 literal relevance. And if they needed more time or whatnot to
21 try to determine that, they could have requested it. But they
22 wanted to go forward on July 6. So arguing that they need
23 to -- you know, because you don't have this lot information,
24 because Congress says you don't have to have it, and that
25 claims based on that and recordkeeping claims based on that

1 are preempted, but now, hey, why do you expect us to know
2 anything till we start getting all this discovery, it puts the
3 Court's whole process on its head. Of course, you wanted them
4 to come forward with proof of relevance. Of course, we had to
5 counter that, and we did.

6 MR. STANOCH: Your Honor, may I respond?

7 THE COURT: Sure, go ahead, counsel.

8 MR. STANOCH: Thank you, Judge. This is David
9 Stanoch for plaintiffs.

10 Judge, I disagree with Ms. Davis's characterization
11 of why we need a declaration in the first place. The point, I
12 believe, was your Honor wanted a declaration from our expert
13 for him to say that we needed the data and what types of data
14 probably exist. We did that. We were not required to
15 disclose his full methodology and put forth a full model
16 showing, from soup to nuts, *Daubert* proof, about how he's
17 going to do traceability. I don't think the Judge
18 contemplated that. I don't think it's specifically possible,
19 given the posture we were in. And I'll just leave it at that.

20 THE COURT: What I'd like to do now is, Defendant,
21 we've talked for awhile, we're still on this tracing issue. I
22 want to give you an opportunity to argue whatever issues,
23 whatever point you want to make regarding why the Court should
24 deny the request to respond to requests for production 1 and
25 3, and then I'm going to give plaintiff a chance to respond,

1 and then we're going to move on to the next issue.

2 So, you've answered my questions, Defendant, and I
3 want to make sure you have a full and fair opportunity to make
4 whatever argument you want to make, to the extent it hasn't
5 been done, regarding what we've been calling this traceability
6 discovery should not be ordered. So the floor is yours.

7 MS. DAVIS: Thank you, your Honor.

8 I think what the back and forth has proven is that
9 the question here and now is whether there is a sufficient
10 record of relevance, proportionality, reasonable
11 accessibility, and good cause squarely within your Honor's
12 *Major Tours* analysis, to support the plaintiffs' just desire,
13 based on what we believe to be speculation from their expert,
14 to impose these two heavy discovery requests on the wholesaler
15 defendants. And these are defendants that, despite three
16 tries from the plaintiff on the economic loss case, have
17 failed to assert even one claim of factual wrongdoing. What
18 they assert is that the wholesalers failed to test the drugs.
19 What they don't allege is any fact to show that the
20 wholesalers knew there was a problem or put on any sort of
21 even constructive notice of a problem prior to the recall, any
22 statement wholesalers made about the drugs, any improper
23 dealings whatsoever about the drugs, and, frankly, you have to
24 get to Paragraph 411 of the economic -- of the third version
25 of the economic loss complaint to get to that allegation, or

1 to figure out that there's nothing there. And why is that?
2 It's because of who the wholesalers are and what they do.
3 They're just middlemen in the drug supply chain. They pass
4 through sealed containers from manufacturers to retailers. So
5 what don't they do, right? They don't manufacture it. We
6 didn't manufacture any of the drugs taken by the plaintiffs,
7 and we didn't actually sell it to the plaintiffs.

8 So, second, we don't keep eight years' worth of
9 financial and sales data sitting around with regard to VCDs
10 only.

11 Third, the wholesalers do not track downstream lot
12 and expiration information that they receive from the
13 manufacturers.

14 And the only argument against the proof from all
15 three wholesalers that that information is not tracked
16 downstream is plaintiffs' expert and the plaintiffs' briefing
17 saying we just don't believe you.

18 Fourth, we've proven that the wholesalers do not know
19 of any way to trace, other than the lot information, which
20 lots and which product went to whom downstream. And, in
21 response to that, there is no articulation of any method by
22 which the plaintiffs' expert could use any of the information
23 that is available and that your Honor's contemplating ordering
24 to get there. So it would be futile.

25 What we also know is that Congress has acted in this

1 space, and has said that wholesalers, specifically, are not
2 required to include that lot number on the downstream sales
3 and are not required to trace that information. It's called
4 the wholesaler exemption to the Drug Safety and Security Act,
5 and it's a thing, it's a real thing, and Congress has backed
6 it up with a preemption provision that says that the states
7 may not in any way impose any burden on wholesalers beyond the
8 tracing requirements and the tracing exemptions within the
9 DSCSA. And that goes for the recordkeeping rules as well.
10 Nothing inconsistent with or more stringent than that. That's
11 going to be preempted.

12 But what the plaintiffs have said is, well, we're
13 going to make you produce all this stuff because you chose not
14 to keep lot information. And that is exactly the type of
15 punitive measure through a lawsuit that the Act is trying to
16 not have happen to wholesalers. But that's what the
17 plaintiffs are asking you to do, to use your authority under
18 the law of the various 50 states to harass wholesalers on this
19 product tracing thing, when they are squarely within the area
20 that Congress anticipated and made, you know, provision for.
21 So, you know, they just speculate, they throw at the wall a
22 few ideas, they reference some things, that they don't even
23 attach in their reply brief. And if it is true that lot and
24 expiration information is not traced downstream, and if it is
25 true that the record before you demonstrates no way that the

1 other information that is available would either tend to prove
2 or disprove product tracing, or could be used in some
3 machination by their expert to get to product tracing, then
4 it's simply not relevant.

5 So, if it's not relevant, what about the burden?

6 Well, we've proven up the hours that would be involved I think
7 is about 140 hours -- I'm sorry -- 140 NDC numbers that would
8 each take three hours per NDC number just to query for one
9 report. And we did that calculation just on the recalled NDC
10 numbers and came up at 130,000. Your Honor, this duplication
11 of effort issue is not minor when you begin talking about
12 burden and the proportionality and the good cause analyses
13 that your Honor is so familiar with.

14 The manufacturers have said, have agreed, they will
15 produce this very information that we're talking about. The
16 manufacturers are going to prove the date of sales, to which
17 wholesaler, the quantity, the NDC number -- right? -- and the
18 gross sales price. That is exactly what the plaintiffs are
19 seeking from wholesalers, just on the other end of those
20 transactions.

21 The retailers have agreed to produce the detail of
22 each of their purchases, which will say the date of the
23 purchase, the wholesaler purchased from, the quantity
24 purchased, and the gross purchase price. That is exactly the
25 other RFP, RFP-III that they're seeking. Exact duplication.

1 So no relevance, exact duplication, excessive cost to
2 wholesalers to begin pulling all these. So where are we on
3 proportionality? The importance of the issues at stake in the
4 litigation? Yes, of course it's important, although that
5 leads to the second, the amount in controversy.

6 We've got a small amount of an inventory of
7 plaintiffs who've been personally injured, and we have
8 overwhelming evidence that with regard to the economic loss
9 case, these plaintiffs would have had to buy a replacement
10 drug, and they are not out dollars to the extent that they
11 claim to be. So I would argue the amount in controversy is
12 not what the plaintiffs have represented it to be.

13 Parties' relative access to information, the
14 manufacturers and retailers not only have everything that the
15 plaintiffs are seeking, they've said they will produce it.

16 Parties' resources, I think it's clear that all of
17 the parties here have good resources, but I would note, in the
18 words of your Honor, no party has an unlimited litigation
19 budget to pay for document production efforts that, in all
20 likelihood, are of marginal benefit. And, regardless of the
21 relevance argument, if this is going to reproduce what's being
22 produced by the manufacturers and the retailers, at a minimum,
23 why not wait to see if they get everything they need on that
24 front?

25 Importance of discovery in resolving the issues, I

1 think none. If these documents do not assist in product
2 tracing, they do not assist in resolving the issues.

3 And whether the burden or expense of the proposed
4 discovery outweighs the likely benefit, I think we've
5 demonstrated the burden over the benefit, based on the prior
6 argument.

7 I would submit, your Honor, that we've also proven
8 that based on the work required to query the system to get
9 this information, the information is not reasonably
10 accessible. And, as your Court knows, if we have proven that,
11 it's not sufficient for the plaintiffs to merely claim that
12 our estimates are exaggerated or inaccurate. They needed to
13 come forward and present contrary estimates or affidavits on
14 that cost estimate, and they didn't do that.

15 If the Court is inclined to entertain that even
16 further, then we're at good cause. And although the elements
17 are close to the proportionality, they're not exactly the
18 same. So the specificity of request, they're pretty specific,
19 although I would note that there seems to be some lack of
20 clarity, based on the reply brief, as to exactly what NDC
21 numbers the plaintiffs want us to search. We thought they
22 wanted us to search all NDC numbers of any VCD from any of
23 these defendant manufacturers. They now make it sound like it
24 may be something less than that.

25 The quantity of information available from other more

1 easily accessed sources, that's exactly manufacturer and
2 retailer agreements. Everything is already on the table.

3 The failure to produce relevant information likely to
4 have previously existed, I don't think that's an issue here.

5 The likelihood of finding new information if this
6 were ordered produced, I think it's zero with the
7 manufacturers and retailers agreeing to produce it.

8 Predictions as to import and usefulness, we've
9 already discussed that.

10 Importance of issues at stake, we've addressed that.

11 And the parties' resources, we've addressed.

12 So, you know, in sum, I know that the temptation is
13 to just view this purchase and sales information on data
14 production, it's just something that's de rigueur for a big
15 company in a big case, but it shouldn't be for whistleblowers.
16 Wouldn't matter if there were 40 middlemen. If it doesn't
17 assist in product tracing, even the plaintiffs don't claim
18 that it's relevant.

19 And we're riding the line here with the DSCSA of
20 making some really bad law. Can you imagine if wholesalers
21 were required to produce this type of data every time there is
22 a product liability suit, every time there is one of these
23 economic loss cases, every time there is a big MDL?

24 So we think on the record before you, Judge, they're
25 just not there on any of relevance, proportionality,

1 reasonable accessibility, or good cause. Thank you.

2 THE COURT: I just have one question, counsel, before
3 we turn it over to Mr. Stanoch. I'm, of course, aware that
4 the wholesalers have argued that the production of the
5 requested information would be burdensome or unduly
6 burdensome. Correct me if I'm wrong, but it's the first time
7 I heard, during this oral argument, that's the first time I
8 heard the wholesalers argue that the requested information was
9 not reasonably accessible. Could you clarify that for me?
10 Can you point to where in the letter briefs that the Court
11 received there was an argument that the requested discovery
12 was not reasonably accessible?

13 MS. DAVIS: So, your Honor, we did cite the *Major*
14 *Tours* opinion in the brief, but we didn't use the words
15 "reasonable accessibility," and part of that was because we
16 were waiting to see the reply, and if there was further
17 information or further discovery or what was going to happen
18 with regard to our cost estimates. But what did happen was
19 they fell squarely within what the plaintiffs had done in
20 *Major Tours*, and they didn't attack that, other than to say we
21 think this is exaggerated, and at that point issues were sort
22 of joined, proof was frozen, and it became clear that we were
23 in, with the burden we had proved, a not reasonably accessible
24 scenario.

25 THE COURT: Okay. So, are you saying then it was

1 implicit in the briefs, or is my understanding correct, it was
2 not specifically mentioned?

3 MS. DAVIS: It was not specifically mentioned, your
4 Honor. The proof -- the proof required to demonstrate lack of
5 reasonable accessibility on our part was put into play in our
6 brief and with our evidence, but the words were not used.

7 THE COURT: Is there -- tell me if I'm wrong, but I
8 understand the concepts of unduly burdensomeness and
9 reasonably accessible to be a little bit different. Do you
10 disagree with me?

11 MS. DAVIS: No, I think they probably are, but when
12 you have the same facts that support the argument that, hey,
13 it's going to be really expensive to go get this information
14 out of our systems, with the evidence that also demonstrates
15 that it's going to take this many hours for somebody to query,
16 and these levels of queries that have to be done, and you've
17 seen in the declarations where, you know, you've got to do
18 repeat searches just to make sure the rows that come out aren't
19 over 400,000, and the computer freezes up, and you've got to
20 start again. That sort of machinations then, I think on their
21 face, underwrote the legal conclusion that not only is it
22 burdensome but it's also, through one view, not reasonably
23 accessible.

24 THE COURT: Fair enough. Okay. Thank you,
25 Defendant.

1 Well, Mr. Stanoch, you have the last word.

2 MR. STANOCH: Thank you, Judge. And I will try to be
3 concise because I believe our letters fully address everything
4 Ms. Davis has raised. I'll just try to hit a few points and
5 answer any questions, Judge.

6 Number one, in Ms. Davis's long litany, I notice she
7 didn't mention anything about confidentiality, so I can only
8 assume that they now agree that the discovery confidentiality
9 order in this case is more than adequate to assuage --

10 MS. DAVIS: Of course not.

11 MR. STANOCH: -- the confidentiality concerns.

12 Well, and our position, Judge, is that obviously, the
13 DCO is adequate in this case, as it is in many, many, many
14 other cases.

15 In terms of DSCSA preemption, Judge, as we say in our
16 papers, that's neither here nor there. We're not trying to
17 impose an obligation on these wholesaler defendants to keep
18 additional information. We know what the statute says and the
19 regulations say. We've read it. But whatever they are
20 required to keep is not the same thing as what they do keep.

21 And, your Honor, we've shown, both with the
22 underlying facts we were able to find publicly available with
23 our expert in his declaration, plus additional facts that we
24 found publicly available from defendants' own websites,
25 showing that their customers can query these types of reports

1 and show lot numbers, in their words, subseconds. So we've
2 put the available facts that we have in there as necessary.

3 In fact, we cite the Form 483 that was issued by the
4 FDA to McKesson because Losartan, one of the products in this
5 case, McKesson sold Losartan to Albertsons, both defendants
6 here, because Albertsons was complaining it didn't have lot
7 and expiration date on it.

8 So I think there is a lot of other evidence in the
9 letters that we cite, Judge, but we think that to the extent
10 you even need the evidence at this pre-discovery stage, there
11 is certainly enough in there to show that we are at least
12 entitled to understand what information does exist in these
13 defendants' records, whether or not that is more, the same, or
14 less than what the DSCSA requires. We think we've shown the
15 likelihood of new information is very high, and that given
16 that these defendants' own customers can request this
17 information, require this information in these wholesalers'
18 own systems, there must be some -- there is information there
19 available, and it should be produced.

20 MS. DAVIS: Judge, may I just address the McKesson
21 connect and the 483?

22 THE COURT: Last word, counsel.

23 MS. DAVIS: The McKesson connect is an outward facing
24 app for pharmacies, and it allows a pharmacy to go in and
25 search the last two years, so that would nicely line up with

1 the recalls. We wanted to talk about two years, instead of
2 eight. But allows them to search their purchases for McKesson
3 for the last two years, but lot and expiration information is
4 not in there unless the pharmacy itself puts it in there
5 because, obviously, we don't track that way.

6 The 483 warning letter relates to the specialized
7 area of suspect product which, in lay terms, means if product
8 comes through the wholesalers that, without opening the sealed
9 container, they should be able to eyeball and see that there
10 is a problem with, they need to capture that suspect product
11 and set it aside. So that doesn't relate to being punished
12 for not tracking lot or expiration information. It said, you
13 got a set of product that, from outside, you should have been
14 able to see there was no lot information on and you didn't set
15 it aside, something completely different. Thank you.

16 THE COURT: Thank you, counsel.

17 Okay. We're going to move on to the second issue,
18 which involves requests for production 2 and 4 directed to the
19 wholesalers, and this might overlap a bit with the retailers'
20 dispute, as well, so I can understand if the retailers want to
21 weigh in.

22 I have a couple of questions for the plaintiff. I
23 don't know who's going to address the issue for the plaintiff.
24 Is it you, Mr. Stanoch?

25 MR. STANOCH: I believe so, your Honor.

1 THE COURT: Okay. With regard to whether this --
2 I'll call it the pricing data -- is relevant, is it
3 plaintiffs' position that the requested discovery is relevant
4 to their unjust enrichment claim and their disgorgement claim?

5 MR. STANOCH: That's partially correct, yes. We
6 think there is more to it, but yes.

7 THE COURT: Okay. Tell me. What else is it relevant
8 to?

9 MR. STANOCH: Your Honor, as we put in our reply
10 brief, we think restitution, disgorgement, are broad,
11 equitable remedies, always available in this Court's arsenal,
12 as well as under the law of many of the states that are
13 alleged in the master complaint. So we think it should not be
14 cabined as sort of the unjust enrichment only method of
15 damages. But, aside from damages in general, as we put in our
16 opening letter, you know, the price is paid by the
17 wholesalers, and, in turn, what they charge downstream are
18 relevant to motive, intent, and notice. And there is -- it's
19 in the public filings and pleadings in this case of other
20 defendants in this case saying the pricing of some overseas
21 drug was suspicious, in fact, and if there is such a drastic
22 price differentiation between foreign overseas valsartan and
23 domestically made valsartan, that is a reason that, we could
24 certainly argue to the finder of fact, should have made it
25 known or reasonably should have known through investigation to

1 the downstream defendants that there was something amiss here,
2 and there must be a reason why. And --

3 THE COURT: So you mean in every case where a
4 consumer alleges that a product cost too much, they can get
5 this profit discovery because they want to show motive,
6 intent, and notice?

7 MR. STANOCH: Well, no, your Honor. I think here we
8 have --

9 THE COURT: Is that -- that's what you're arguing,
10 isn't it?

11 MR. STANOCH: I am arguing that it is a basis for the
12 discovery, yes, but I am not arguing it is a basis in every
13 single case where someone said the product was too expensive.

14 What we're saying here is that there is already in
15 the public record, in the pleadings and the complaints and
16 otherwise, statements by other defendants actually calling out
17 the pricing here and statements by other defendants saying
18 that they cut low prices on purpose, and there is enough
19 evidence to suggest that there is a reasonable basis --

20 THE COURT: Oh, I see.

21 MR. STANOCH: -- the situation that happened here.

22 THE COURT: I see. You're saying because the
23 purchasers got such a good deal and the prices were so cheap,
24 that they should have questioned whether there was a reason
25 why the prices were so cheap. Is that what you're saying?

1 MR. STANOCH: Correct, your Honor.

2 THE COURT: Okay. So if Walmart sells Tide detergent
3 \$3 less than Shoprite, purchasers should be put on notice that
4 the Tide Walmart, by itself, is somehow defective compared to
5 the Tide that Shoprite sells? Is that what you're saying?

6 MR. STANOCH: No, your Honor. No, I'd say if I'm a
7 distributor, and I'm buying valsartan from one person, I'm
8 making it up for \$10 a bottle, and then -- someone who sells
9 in the U.S., and then someone from China comes to me and says
10 we'll sell it to you for 50 cents a bottle, I think the
11 magnitude of the delta is such that someone exercising
12 reasonable diligence would have to question that and do due
13 diligence to see what, if anything, might be the explanation.

14 THE COURT: But isn't that why people -- listen, I'm
15 not an expert on manufacturing, but isn't that why so many
16 products are made in China, because maybe they don't pay a
17 minimum wage or have the environmental regulations? So if
18 someone buys a cheaper T-shirt that's made in China, they
19 should question whether it's defective or not? That's not
20 your strongest argument, counsel.

21 So we know you're arguing this pricing information is
22 relevant to damages, motive, intent, notice. Anything else?

23 MR. STANOCH: No, your Honor. Those are the
24 principal reasons.

25 THE COURT: Can you tell me -- and I have to

1 understand this because I think it's important -- how this
2 pricing requested discovery, if it is, is relevant to class
3 certification?

4 MR. STANOCH: At the class certification stage, your
5 Honor, I'm sure you know, the plaintiffs will have to come
6 forth with a damages model showing that damages are
7 susceptible to classwide proof. And that's usually done,
8 traditionally, with an expert modeling damages for a defendant
9 or group of defendants. For that model to be put together, we
10 need all of the inputs -- what was bought, for how much, who
11 you sold it to, for how much. The delta between those two
12 things are your ill-gotten gains, which we would say are class
13 damages. Again, please don't hold me to it, because it's
14 premature at this stage, but speaking very generally, that is
15 the usual procedure.

16 THE COURT: Do you have to produce an actual report
17 computing the numbers -- you being the plaintiff -- or does
18 the plaintiff have to say if I get this data, this is how I
19 would put together the damage model?

20 MR. STANOCH: I think the defendants in the case will
21 argue that Third Circuit law requires plaintiffs to put
22 together the model and use the data to show how -- to run the
23 model, using the data.

24 THE COURT: So if, hypothetically -- I'm not ruling
25 right now -- suppose the Court says no, we're going to

1 give plaintiff this pricing data because the defendants have
2 argued it's irrelevant, burdensome, et cetera, et cetera. Do
3 you think that the Court would then permit the defendant, who
4 has argued this information is not discoverable, that it's a
5 basis to deny certification? In other words -- I didn't say
6 that as clearly as I should have.

7 Do you think it's reasonable or feasible or possible
8 that plaintiffs can rely on the fact that the -- I'm sorry --
9 defendants can rely on the fact that plaintiffs have not
10 produced a profit model, when the defendants refuse to produce
11 the profit discovery to the plaintiffs?

12 MR. STANOCH: Unfortunately, your Honor, I believe it
13 would be an argument used by the defendants against us, and
14 they would probably say that it was plaintiffs' burden to show
15 every element as susceptible to classwide proof, including
16 damages, and that we did not get the information that we
17 sought, and that we do not find an adequate alternative to
18 that, shows that we cannot prove on the a classwide basis the
19 element of damages. And that's why we say if they would agree
20 to waive or stipulate that they won't oppose class cert or
21 raise a defense at another point, then we can certainly think
22 about that and maybe we can have a compromise. But, absent
23 that -- and we have floated this before, and not a single
24 defendant has agreed, and I'm not surprised. But, absent
25 that, if we have no guarantee that the fact that we did not

1 get the information, even if your Honor says -- precluded us
2 from getting it, it's still our burden, and we have not
3 discharged our burden. And that's a situation that we can't
4 have ourselves in, unfortunately.

5 THE COURT: Question for you.

6 MR. STANOCH: Yes, Judge.

7 THE COURT: We read the cases that the plaintiff
8 cited where the Court has ordered the production of pricing
9 and profit information. We're not dealing with the punitive
10 damage issue right now. We're not dealing with an antitrust
11 case. We're not dealing with a patent case.

12 Have you cited one case -- and, obviously, I'm not
13 deciding the merits of the claim. This is not a Rule 12
14 context. So, just to be clear, I'm not ruling on the merits.
15 Of course not. But have you cited one case in the product
16 liability context where a Court has said that the plaintiffs
17 are entitled, in discovery, to this type of profit
18 information, pricing information? One case?

19 MR. STANOCH: I think, though we probably did not --
20 we certainly did cite it in our reply brief, cases that
21 allowed state law claims to go forward, as well as
22 certification of a New Jersey unjust enrichment class, and a
23 Minnesota Consumer Fraud Statute class, which was *Hudock*
24 versus *LG Electronics*, 220 Westlaw 1515233, and in that
25 opinion, the damages model put forth for unjust enrichment

1 relied on that information.

2 So, to your direct question, no, we did not
3 specifically cite a case on a discovery posture, but there was
4 certainly the cases saying, on certification, that that was
5 the proper damages and proper inputs to show any damages
6 model.

7 THE COURT: Question for you. Who is it -- we have
8 three master complaints. Which set of plaintiffs are
9 asserting this disgorgement, unjust enrichment type claim? Is
10 it all of them or one group or some combination?

11 MR. STANOCH: I believe it's some combination, Judge.
12 It's certainly the master economic loss class action
13 complaint. I believe, I don't have it in front of me, that
14 the short-form complaints for personal injury cases have a
15 check box for number of state law claims for that individual
16 plaintiff, and I believe it may include unjust enrichment,
17 though I do not have it in front of me, and I do not recall
18 either way whether the medical monitoring complaint had unjust
19 enrichment or not in it.

20 THE COURT: Okay. Hypothetical, again, I'm making
21 this up. Suppose the case goes to trial, and the plaintiffs
22 win, and the jury says there has been \$100 in profit. Who
23 gets that money?

24 MR. STANOCH: Would that be a economic loss case,
25 your Honor?

1 THE COURT: Let's assume it's the economic loss case.
2 Why would those economic loss plaintiffs, the third-party
3 payors, why would they get that profit? They didn't -- it's
4 not a damage to them, is it?

5 MR. STANOCH: It is -- the principles of disgorgement
6 and restitution is so that a defendant does not benefit from
7 its own wrongdoing, and that the law under the various
8 states, and I believe the federal law in terms of it being an
9 equitable remedy valuable, is to deter that and to put it in
10 the hands of the next best, which are the plaintiffs, who
11 would have been harmed by the sale of the offended product.

12 THE COURT: Okay. Suppose I buy a toaster, the
13 toaster is defective, I'm injured, I go to trial, I win. The
14 jury says the toaster is defective. Am I entitled to the
15 profits that the manufacturer made on that toaster?

16 MR. STANOCH: I would argue yes, Judge. The *Hudock*
17 case with the New Jersey unjust enrichment class and the
18 Minnesota consumer protection class, that was a case by
19 consumers against LG Electronics, the appliance and television
20 manufacturer. They weren't seeking Walmart or Best Buy's
21 ill-gotten gains. That was ill-gotten gains by the
22 manufacturer, LG Electronics.

23 THE COURT: Okay. In this context, are you seeking
24 the "ill-gotten gains," the profits from the manufacturer? In
25 the present context, where we're dealing with the wholesaler,

1 retailer issue.

2 MR. STANOCH: Yes.

3 THE COURT: So are plaintiffs totally missing the
4 mark then? In every single product liability case that is
5 filed from here on out, if a plaintiff's attorney was doing
6 their job, they should seek disgorgement of profits, in
7 addition to personal injuries?

8 MR. STANOCH: I can't speak, obviously, what other
9 lawyers should do in every future products liability case,
10 Judge, but we think the facts in this case will be sufficient
11 to show that the defendants in each of the steps with the
12 contaminated fraud is different than, say, a toaster with a
13 handle that didn't quite work or the heating coil didn't get
14 as hot as it said.

15 THE COURT: Do I take it that plaintiffs are also
16 seeking this type of remedy from the manufacturers?

17 MR. STANOCH: We are, yes, Judge.

18 THE COURT: I know it's not an issue before the Court
19 now, but are there ongoing discussions with the manufacturers
20 about whether this type of what I call profit, sales type
21 information, is going to be produced?

22 MR. STANOCH: Yes. In fact, the pricing or cost
23 information was part of what the defendants did produce, and
24 your Honor will recall from a couple weeks ago, there were
25 talks with questions we had about one or two particular

1 defendants' data, and some of those questions related to how
2 they tracked the cost side, the profits, so to speak, on the
3 sales of valsartan, whether it was by customer or whether it
4 was through product levels, in other words, did we make five
5 cents a pill or did we make \$500,000 for all sales to the
6 company. So, regardless of the question of how it was kept
7 and maintained, it was data in some form, at least, I think
8 was produced by most, if not all, of the manufacturer
9 defendants by now.

10 THE COURT: Another question for you. You're seeking
11 the same type of data from the wholesalers, retailers that
12 you're seeking from the manufacturers in terms of the profit
13 type information. Am I right about that?

14 MR. STANOCH: Yes, Judge.

15 THE COURT: All right. Do the issues rise or fall
16 together? In other words, hypothetically -- I'm not ruling
17 right now -- suppose the Court says no, you're not going to
18 get it or at least you're not going to get it now from the
19 wholesalers and the retailers. Does that necessarily mean
20 that the same position has to be taken with regard to the
21 manufacturers or are the situations and claims different or
22 distinguishable?

23 MR. STANOCH: I think it may be hard to distinguish
24 between them, Judge, and here's why. If a given
25 manufacturer -- I don't want to pick names because I want to

1 be sure, but I know there is data from a manufacturer that
2 doesn't keep or said it doesn't keep data on its profits
3 selling per customer; it just says, you know, we sold X amount
4 of valsartan, 160 milligrams, we made X amount of dollars.

5 Right? They can't tell us where the profits are coming from.

6 We would need the wholesaler defendants to tell us
7 what they paid so we can then figure out what the cost of the
8 drug was from the manufacturer down to the wholesaler, to know
9 what the profit was on the sale of the defendants in this
10 case, and so forth down the chain.

11 THE COURT: Okay. That's your argument that the
12 discovery you want from the wholesalers and retailers, for
13 that matter, is relevant to the damages recoverable from the
14 manufacturer?

15 MR. STANOCH: Correct.

16 THE COURT: The profit information, pricing
17 information from the manufacturer, is that also relevant to
18 damages and motive, intent, and notice?

19 MR. STANOCH: It would be, yes, Judge.

20 THE COURT: Any other reasons that it might be
21 relevant for the manufacturers that doesn't also apply to the
22 wholesalers and retailers?

23 MR. STANOCH: I think it would be the same reasons
24 for each tier of defendant, Judge.

25 THE COURT: Okay. All right. So I will let you have

1 the last word on this. I want to turn the call over to the
2 wholesalers, and then we'll hear from the retailers, because
3 it might be the same issue. I don't have any particular
4 questions for you, but I want to make sure you feel that you
5 have a full opportunity to present any argument you want as to
6 why the requested sales and pricing information shouldn't be
7 produced.

8 MS. DAVIS: So, your Honor, D'Lesli Davis for the
9 wholesalers.

10 I'm confused because I thought I heard the
11 plaintiffs' counsel first say that, yes, the manufacturers
12 have all agreed to give us profit information, the
13 differential between their cost of goods sold and their sale
14 price. And then he came back later and said, oh, but we need
15 this from the wholesalers too or we won't be able to figure
16 out the manufacturers' profit. So I'm confused by that. I
17 think his first position was the correct one, and there is not
18 a need for the wholesaler information to determine
19 manufacturer profits.

20 And then you had asked, your Honor, if there was a
21 way to differentiate this unjust enrichment/disgorgement of
22 profit claim as it exists towards the manufacturers versus the
23 downstream defendants, and, basically, because I know we want
24 everything from all of them, for all of their ill-gotten
25 gains, but there is a very simple way to distinguish them.

1 There are many factual allegations of wrongdoing against
2 manufacturers, starting with the failure to use good
3 manufacturing practices, and there is only one factual
4 allegation against the wholesalers, which is you didn't open
5 the sealed containers and test the product.

6 And, as your Honor is well aware, in addition to all
7 the things we have already discussed with the DSCSA, there are
8 innocent sealed -- innocent sellers sealed container statutes
9 all across the country that say if a wholesaler wants to be
10 insulated from liability, they should not open the container
11 or alter the drug. That's how you get insulation, and that's
12 how you get a defense against liability.

13 So, the Court has been very practical in trying to
14 approach discovery issues and, from a practical standpoint,
15 the Court can very easily see here that when it comes to the
16 core plaintiffs' claims, in the personal injury action their
17 real damages are their personal injuries -- their medical
18 expenses, their pain and suffering, lost wages, et cetera --
19 and they have custody and control of all of that.

20 When it comes to the medical monitoring class action,
21 the damages are whatever it would be to monitor the class's
22 health on an ongoing basis. They have access to however
23 they're going to figure out what that is.

24 And when it comes to the economic loss plaintiffs,
25 what they're saying is that each of the individual plaintiffs

1 shouldn't have paid for this drug, and the individual
2 plaintiffs know what they paid for that drug, and that too is
3 within their custody. So there is not any sort of -- well, I
4 guess, let me back up.

5 The plaintiffs didn't argue anything about choice of
6 law to you. They just randomly picked different cases that
7 they thought were helpful. But when we went forward with New
8 Jersey laws or the home state law of the Court, and the
9 plaintiffs' attorney, you know, they sort of flipped out
10 because there is some core fundamental truths about unjust
11 enrichment and disgorgement of profits that New Jersey has
12 recognized. And the first is that, you know, it's limited to
13 allegations of conscious wrongdoing, of which there are zero
14 against the wholesalers in this case. And that's not just the
15 District of New Jersey. That's the Restatement (Third) of
16 Unjust Enrichment. Plaintiffs haven't alleged conscious
17 wrongdoing, and there is no place in the country, probably,
18 that would allow a disgorgement of profits without a factual
19 claim of wrongdoing.

20 And the New Jersey law, again, is an exemplar.
21 There's two other instructive things about unjust
22 enrichment/disgorgement of profits, and that, of course, is
23 what they're arguing in their brief is the only thing that
24 really entitles them to this. I think they make a side-wide
25 throw at, you know, Court has inherent power to do that. But

1 the plaintiff must have conferred a direct benefit, that
2 plaintiff on this defendant. Wholesalers are in the middle.
3 There is no direct benefit by any of these plaintiffs,
4 whichever complaint you want to look at, to these defendants.
5 And unjust enrichment is available really where there is even
6 equitable remedy, right, available where there is no other
7 relief available. And if there is one thing that plaintiffs
8 have done, it is that they have invoked every other possible
9 type of relief available, both in tort, and then the UCC
10 damages too.

11 So, from the practical standpoint here, the unjust
12 enrichment claim is not even factually pled as to wholesalers,
13 and without the facts there, when it's something this
14 sensitive, the proprietary information, the trade secret
15 nature has been proven up, and when the plaintiffs, after
16 three times, don't even fit their unjust enrichment
17 pleading -- which, by the way, is only in the economic loss
18 complaint -- into the four corners of the home state law,
19 there are reasons for that, of course.

20 And so, at a minimum, we would submit that it would
21 be premature to jump into ordering this sort of sensitive
22 information, with the 12(b) (6) coming up, which is simply
23 going to argue that on the face of these pleadings, there are
24 no facts alleged, even taking all of the allegations made by
25 the plaintiff as true, that would support any sort of unjust

1 enrichment or disgorgement of profits for, you know,
2 ill-gotten gains, and that that cause of action is going to be
3 dismissed.

4 So, at a minimum, we would argue that this sort of --
5 these two discovery requests should be stayed.

6 Let me back up just a little bit, too, and point out
7 to the Court that each of these requests seek not only gross
8 prices, meaning wholesalers' gross prices, but the net prices.
9 Now, "net" is not defined. And when we talk to the plaintiffs
10 in the meet and confer, all we hear about is sort of profits,
11 profits, profit.

12 And so, in addition to the demonstrated burden to
13 pull the gross price information, which we've already
14 discussed just with regard to recalled NDC numbers, we are
15 also talking when we talk about true profits or true net
16 price, even though it's undefined, we're talking about
17 creating something uniquely for discovery, something that does
18 not exist at the -- at the wholesaler companies currently
19 because they do not track their profits by
20 valsartan-containing drug or even by NDC number. So to
21 extract the information that would be required to figure out
22 underlying costs and give a true representation of what would
23 be a profit figure or a net price, whether you're talking
24 about transportation, overhead, taxes, rebates, chargebacks,
25 whatever else, over eight years and the thousands of sales

1 that we're talking about, you know, we're talking about a
2 whole new burden here that is just really staggering when you
3 think of the different legacy systems involved, the
4 administrators that may have been there and left, and the
5 different functional areas, right, that would have to be
6 involved -- IT, accountants, sales, the business units, tax,
7 and then you probably have to go outside the company as well
8 to get some work done on that.

9 So it's hard to believe that it makes sense, based on
10 the face of the pleadings, at all. Plaintiffs should be held
11 to their pleadings. I mean, the wholesalers deserve some
12 protection when the plaintiffs don't allege wrongdoing, and
13 then come and seek this highly sensitive information.

14 But, at a minimum, your Honor, given the burden and
15 given the upcoming 12(b)(6)s, we would argue that not only
16 does it make sense to table that, at a minimum, but that there
17 is no real harm to the plaintiffs to do so. If this were to
18 be held till, say, January, when there are rulings on
19 12(b)(6), the plaintiffs are still proceeding with all other
20 discovery as to wholesalers, they're still getting the profit
21 information from their target, all allegations of wrongdoing
22 which are the manufacturers, and there is still time before
23 any sort of trial or, I might add, class certification, so, to
24 catch up, if by some miracle the unjust enrichment or
25 disgorgement of profits survive as to the wholesaler

1 defendants.

2 We'll rely on -- to try to be concise, we'll rely on
3 everything else that we have in the brief, and, of course, are
4 happy to answer any questions, and are, of course, happy to
5 apply all of these factual details as proven up in the
6 declarations to the proportionality or good cause elements, as
7 well, if the Court is interested in that. I think a lot of it
8 is repetitious and I think a lot of it is sort of
9 self-apparent from the argument that I just made, but I want
10 to make sure we don't miss anything that your Honor is
11 concerned about.

12 THE COURT: Thank you, counsel. You've been
13 comprehensive.

14 How about the retailers, do you want to weigh in on
15 this issue? Because am I wrong that, in effect, it's the same
16 issue that the retailers are arguing about?

17 MS. JOHNSTON: Yes, your Honor. And I will be brief
18 and try not to repeat too much of what Ms. Davis said. I
19 think that most of what she articulated is applicable to the
20 retailers in their role as a downstream --

21 THE COURT REPORTER: I'm sorry. Who's speaking?

22 MS. JOHNSTON: I'm sorry. This is Sarah Johnston.

23 THE COURT REPORTER: Thank you.

24 MS. JOHNSTON: Your Honor, I would say, you know,
25 first off, that the questions that you ask I think are the

1 right questions, and they're the questions that we have as
2 well, and to respond to those, I think it is telling that
3 there are no cases cited in plaintiffs' briefing that would be
4 applicable to a case like this, and we are talking about a
5 true product liability context in which there is no allegation
6 of wrongdoing as to these defendants. Because the remedies
7 that plaintiffs are suggesting is the one that they are
8 pursuing, is not the remedies that they will be entitled to
9 once -- if and when this case ever gets to class certification
10 as to the downstream defendants.

11 Secondly, the same question you asked is one that
12 we've had, which is when we talked about this, quote, unquote,
13 damages model this information is so important for, it's very
14 unclear which plaintiffs we are talking about, and as to the
15 retailers, and for the purposes of working up the economic
16 loss class, we are only named as to the consumer class portion
17 of that, and so the question you raise about, you know, are
18 you entitled to the profits on a toaster is the same general
19 question that we've had. If you truly are claiming that you
20 are damaged by virtue of purchasing this allegedly
21 contaminated drug, is your remedy truly the disgorgement of
22 profits or is it payment for the out-of-pocket expense? And
23 we would argue that it's the latter, because that is what
24 makes sense in thinking conceptually about what the possible
25 damages would be.

1 Third, you asked, you know, is -- are the different
2 tiers of defendants interrelated, assuming that this is
3 something that -- that plaintiffs are ordered -- or that
4 defendants are ordered to produce to plaintiffs, and the
5 answer to that is no. And I think that there is not a
6 conceivable way that profits as to the manufacturers for
7 purposes of this disgorgement argument would rely on the
8 profit of the downstream defendants, because they don't, and,
9 realistically, it's not -- it's not possible to conceive of
10 how a manufacturer couldn't determine what its profits were
11 without relying on a bunch of other entities in the supply
12 chain. So I don't think that they are interrelated. I
13 understand why plaintiff would want to argue that they are,
14 but the -- it does not make sense from a very common sense
15 perspective.

16 And then, finally, there is -- again, there is no
17 allegation of wrongdoing that would make this discussion one
18 that would be needed to have. And so, I echo the same
19 questions. And then I also can't overlook the fact that when
20 we're talking about this, in every discussion that we've had
21 thus far about, you know, this damages model, and why it is
22 that plaintiffs would need this information, the response is
23 always because we need it, because it's relevant. And when
24 pressed further, it's never -- it's never clear, one, why it's
25 relevant, or, two, who it's relevant for, which makes it all

1 the more troubling that we've gone through this process and
2 obtained 14 declarations that explain explicitly to the Court
3 why there is such concern about having to produce it, and, in
4 response, all we hear is, well, we should get it because we
5 want it.

6 And then finally, as to Ms. Davis's last point, I
7 agree, the Rule 12 issue is -- is and has been on the horizon
8 and, you know, a number of the arguments that would be tied to
9 this issue of whether or not disgorgement of profits are even
10 available are directly tied to the issues that are going to be
11 briefed on Rule 12. So the -- the idea of reaching this issue
12 before the Rule 12 briefings are considered by the Court I
13 think is a premature action, and while, you know, there are a
14 number of reasons to say that this is an inappropriate theory
15 of recovery, I think it also truly does highlight why this is
16 something that can't be taken up by the Court until Judge
17 Kugler has been able to review and reach a decision on this
18 issue at the time of the Rule 12.

19 THE COURT: Thank you, counsel.

20 Plaintiffs, you have the last word.

21 MR. STANOCH: Thank you, Judge.

22 We've said in our letter multiple times, I'm not sure
23 how many other ways we can say it, that to calculate
24 ill-gotten gains, it's what you sold something for, say 10
25 bucks, minus what it cost, say 4, your profits are 6. Not

1 that I want it. That's how the math is done. That's what the
2 case law shows is done.

3 These are valid claims, your Honor. These are valid
4 methods of recovery. Plaintiffs will be prejudiced at class
5 cert and later eventually at trial. They don't have the facts
6 necessary to show on a classwide basis method for calculating
7 damages under this theory.

8 They may argue, ultimately, that the theory might not
9 be -- might not be selected or might not carry the day at
10 trial, but that doesn't relieve me of my obligation as
11 plaintiff to come forward with the model supported by the
12 right data, and the only way to get the data is to get it from
13 these defendants.

14 And none of them have said that they would stipulate
15 not to oppose class cert on this basis, which we have invited
16 them to do, which means then the only alternative to that is
17 we have to seek the information.

18 THE COURT: Thank you.

19 Defendants, one last question. If the Court denies
20 the requested discovery, can defendants rely on plaintiffs'
21 failure to produce profit information as a basis to deny class
22 certification? Ms. Davis, how about you?

23 (No response.)

24 THE COURT: You're not at a loss for words, are you?
25 Ms. Davis, are you there?

1 MS. DAVIS: Sorry, your Honor. I was talking; I was
2 on mute.

3 So, to clarify, the Court's question is, if the
4 unjust enrichment claim were to survive 12(b)(6) against the
5 wholesalers on the current pleadings, and a denial of this
6 information continued beyond that point, what proposed
7 subclass would -- is anyone anticipating that the defendants
8 would come in and say, no, no, no, you don't have my profit
9 information? The class certification at that point is going
10 to be, we have a class of these people who used contaminated
11 valsartan, and the fights that I'm envisioning are on
12 clarifying that it has been to be somebody that can prove
13 product identification and all these other damage issues that
14 we've talked about, but I don't understand the implications or
15 what is being suggested that inhibits a class argument or
16 class certification just based on disgorgement of profits.

17 THE COURT: Ms. Johnston, do you want to weigh in?

18 MS. JOHNSTON: Yes, your Honor.

19 I think that the argument we would make is really
20 that the idea that disgorgement of profits as a damages model
21 in the first place would be appropriate, and for all the
22 reasons we've discussed and mentioned in our briefing, we
23 don't think that that is, for a number of reasons. But it's
24 also truly difficult for us to weigh that question without
25 plaintiffs having specifically articulated how this damage

1 model would even work as to the downstream defendants because
2 the remedy suggested by it is not an available remedy.

3 THE COURT: Okay. Thank you, counsel.

4 The record is closed on these discovery disputes.

5 What I'd like to do at this point, if I can ask your
6 indulgence, is if you have no objection, to take a short
7 break -- we've been at this for two hours -- reconvene at
8 4:00. We can call back in. And I'll read you the Court's
9 opinion and order into the record. Will everyone be available
10 and, most importantly, Carol, are you available?

11 THE COURT REPORTER: Yes, your Honor.

12 MS. DAVIS: Yes, your Honor.

13 MR. SLATER: Of course, Judge.

14 MR. STANOCH: Yes, your Honor.

15 THE COURT: So we'll adjourn for a little less than
16 30 minutes, reconvene at 4:00, and then you'll get the Court's
17 ruling. We will see you in a few minutes, counsel. Thank you
18 very much.

19 (A recess was taken from 3:35 p.m. to 4:00 p.m.)

20 THE COURT: Okay. We're back on the record in the
21 Valsartan matter. This is Judge Schneider.

22 I'm going to read into the record the Court's oral
23 opinion regarding the macro discovery disputes involved with
24 the wholesaler and retailer defendants, to be confirmed in a
25 Court order to be entered.

1 This matter is before the Court on what the Court has
2 called macro discovery disputes between the plaintiffs and the
3 wholesaler and retailer/pharmacy groups of defendants.

4 The Court heard oral argument this date, July 6,
5 2020, via conference call. As will be discussed in more
6 detail, the discovery disputes generally relate to plaintiffs'
7 requests for tracking, pricing, profit, and sales information
8 from the wholesalers and retailers. This will serve as the
9 Court's oral opinion, to be confirmed in an Order to be
10 entered.

11 The parties are obviously familiar with the
12 background of this matter, so only a brief summary will be
13 provided.

14 This MDL involves the sale and consumption of
15 allegedly contaminated valsartan blood pressure prescription
16 medication. Three general master complaints have been filed:
17 one, a proposed nationwide class action seeking economic
18 damages on behalf of third-party payors; two, a proposed
19 nationwide class action requesting medical monitoring relief;
20 and three, a master complaint alleging consumers contracted
21 various forms of cancer from ingesting valsartan contaminated
22 with cancer-causing chemicals.

23 In excess of 300 separate bodily injury complaints
24 have been filed to date, and recently approximately 30 new
25 complaints are being filed per month.

1 Plaintiffs have sued various groups of defendants in
2 the valsartan supply chain, starting with the foreign
3 manufacturers of the active pharmaceutical ingredient, then
4 proceeding to the finished dose manufacturers, then the
5 so-called downstream defendants, which are the wholesalers and
6 the retailers.

7 The API and finished dose manufacturer defendants
8 have been and will be collectively referred to as "the
9 manufacturing defendants."

10 The three wholesalers in the case are the major
11 wholesale players in the distribution chain who comprise the
12 majority of the wholesale market. These wholesalers are
13 McKesson, Cardinal Health, and AmerisourceBergen.

14 The retail defendants are familiar names in the
15 business such as CVS, Rite Aid, Walgreens, Walmart, et cetera.

16 To date, the parties' discovery efforts have focused
17 on plaintiffs and the manufacturer defendants, and these
18 defendants are in the process of responding to requests for
19 production approved by the Court.

20 Since the discovery directed to the manufacturing
21 defendants is well underway, it is now time to turn to the
22 downstream defendants. Although these defendants vigorously
23 deny any liability in the case, there is no doubt they possess
24 some relevant and discoverable information to which plaintiffs
25 are entitled. To a large extent, plaintiffs and the

1 downstream defendants have been able to resolve their
2 disputes, which are reflected in the red-line version of
3 plaintiffs' proposed requests for production attached as
4 Exhibits B and C to plaintiffs' April 13, 2020, letter brief,
5 Docket Number 413.

6 The remaining disputes are the subject of this oral
7 opinion.

8 Insofar as the procedural history of the case is
9 concerned, until just recently, the Court has barred motions
10 to dismiss. Nevertheless, defendants' motions to dismiss will
11 soon be filed and heard, to be followed in short order at an
12 unknown future date by motions for class certification.

13 In the meantime, discovery is proceeding and the
14 manufacturing defendants' ESI document production will be
15 completed in the fall, with fulsome rolling productions
16 between now and then.

17 The Court anticipates depositions will start in the
18 late fall, but no later than December or January.

19 Starting with the wholesaler defendants, the parties
20 dispute the extent of the upstream and downstream purchasing,
21 sales, and pricing discovery that must be produced. As to the
22 wholesalers' purchases and sales, in general fashion,
23 plaintiffs want to know the details of the wholesalers'
24 purchases of valsartan-containing drugs from defendant
25 manufacturers from January 1, 2012, to December 31, 2019.

1 Plaintiffs want the same information for the same time period
2 for the wholesalers' sales to defendant retailers.

3 As to pricing, plaintiffs want the financial details
4 of each of the wholesalers' purchases and sales of
5 valsartan-containing drugs during the designated time period.

6 The Court will first address plaintiffs' request for
7 purchasing and sales discovery from the wholesaler defendants
8 which has been referred to as tracing discovery. As to this
9 nonfinancial discovery, plaintiffs argue the discovery is
10 relevant to tracking the supply chain of the
11 valsartan-containing drugs plaintiffs consumed and/or paid
12 for. Plaintiffs argue the discovery is critical to knowing,
13 in plaintiffs' words, who sold what and to whom. Plaintiffs
14 maintain the requested discovery is helpful to showing which
15 manufacturer defendants' valsartan-containing drugs made it
16 into plaintiffs' hands and will enable plaintiffs to track
17 what valsartan the wholesaler defendants purchased and, in
18 turn, to whom they sold the valsartan. The Court refers to
19 this as tracing or tracking discovery.

20 The wholesaler defendants object to plaintiffs'
21 request for tracking or tracing discovery on various grounds,
22 including the following: one, the requested discovery is not
23 relevant; two, the requested discovery is not genuinely needed
24 since it is duplicative of discovery to be produced by other
25 defendants; three, the claims that plaintiffs need the

1 discovery for are futile; four, the requested discovery is
2 highly proprietary and trade secret; and five, the requested
3 discovery is disproportionate to the needs of the case and
4 unduly burdensome to produce.

5 The most important question the Court must decide in
6 this context regarding plaintiffs' request for purchasing and
7 sales discovery from the wholesaler defendants or, in the
8 Court's words, tracing discovery, is whether the requested
9 discovery is relevant. If the answer is no, plaintiffs do not
10 get any. If the answer is yes, the Court must address
11 defendants' other arguments for why the requested discovery
12 should not be produced.

13 Having considered the total record produced by the
14 parties, including the declaration submitted by plaintiffs'
15 data analytical consulting expert and the declarations
16 submitted by the three wholesaler defendants, the Court finds
17 that the requested discovery is plainly relevant to core
18 issues in the case. It is unquestionably the case that a
19 critical issue in the litigation is and will be whether
20 plaintiffs consumed defendants' contaminated valsartan. The
21 requested discovery asking for the details of the wholesalers'
22 purchases and sales of valsartan-containing drugs is relevant
23 to this issue.

24 The Court, of course, recognizes that the wholesalers
25 have made a strong *prima facie* case that they do not track

1 their sales to retailers by lot numbers and that this is not
2 required under the Drug Supply Chain and Security Act.
3 However, the Court rejects the notion that if the wholesalers
4 do not track sales by lot number, plaintiffs' requested
5 discovery is irrelevant. The wholesalers ignore the fact that
6 plaintiffs and their expert argue that even without the lot
7 number, the wholesalers possess information relevant to
8 tracking their sales. See generally the declaration submitted
9 by plaintiffs' expert consultant, Paragraphs 11, 29, 36, and
10 46.

11 For example, in Paragraph 46, plaintiffs' expert
12 concludes that given the extent of the data kept by the
13 wholesalers, the wholesalers are able to identify how best to
14 link their sales shipments to recalled lots.

15 See also Paragraph 29 where the expert states that
16 even without a lot number, there are, quote, unquote, many
17 ways to link a dispensed product to a lot.

18 In addition, in Paragraph 36, the expert states that
19 the wholesalers have more than enough information in their
20 inventory systems that could be used to associate lot numbers
21 with the wholesalers' sales. Plaintiffs refer, for example,
22 to DSCSA shipment labels, the wholesalers' inventory control
23 systems, Advance Shipping Notices, T3 documents, and
24 expiration dates.

25 The Court notes that the wholesalers spent most of

1 their brief arguing that they are not required to track sales
2 by lot numbers. However, as plaintiffs argue, and the Court
3 agrees, this does not mean the wholesaler defendants have no
4 helpful tracing data. The wholesalers have the lot number
5 provided by the manufacturers. They also know the NDC number,
6 the manufacturer's name, quantities, dosage, and perhaps the
7 expiration date. Plaintiffs are entitled to see for
8 themselves if they can use this relevant data, combined with
9 the information from the wholesalers' sophisticated inventory
10 control systems, to trace plaintiffs' purchases.

11 The Court, of course, is not blind to the fact that
12 the wholesalers vigorously contest plaintiffs' conclusions.
13 Representative of the wholesalers' position is the declaration
14 of Scott Mooney from McKesson. Apart from stating that the
15 wholesalers are not required to track by lot number, Mooney
16 concludes "no amount of discovery will allow plaintiffs to
17 trace lots from the wholesaler defendants to retailer
18 defendants and then into the individual plaintiff's hands."
19 Paragraph 61.

20 He also concludes there is no way to find out the
21 lots a specific retailer defendant received from a wholesaler.
22 Paragraph 64.

23 At this stage of the case, however, the Court is
24 not prepared to give conclusive binding effect to Mooney's
25 statements. The wholesalers' conclusions have been disputed

1 by plaintiffs' qualified expert, and plaintiffs should have an
2 opportunity to test and question the wholesalers' conclusions.

3 In this regard, plaintiffs' reply brief persuasively
4 points out the wholesalers' representations concerning their
5 inventory control systems are not entirely consistent with the
6 averments in the wholesalers' declarations. Plaintiffs are
7 entitled to know for themselves if the wholesalers' documents
8 will enable them to trace plaintiffs' purchases. At this
9 stage of the case, plaintiffs are entitled to find out for
10 themselves if they can trace plaintiffs' purchases, with help
11 from the wholesalers' documents. Plaintiffs are not now bound
12 to accept the wholesalers' conclusions at face value,
13 especially when they are contested by plaintiffs' expert.

14 Having found the requested tracing discovery is
15 relevant to core issues in the case, the Court can quickly
16 dispense with the wholesalers' other arguments for why
17 plaintiffs' discovery should be denied:

18 (1) While some of the discovery the wholesalers will
19 produce will overlap the manufacturers' and perhaps the
20 retailers' discovery, the discovery is not duplicative. The
21 wholesalers undoubtedly have internal documents that the
22 manufacturers and retailers do not have, and vice versa. In
23 order to assure plaintiffs have a complete production, the
24 wholesalers must produce their own documents and ESI, even if
25 there is some overlap with other groups of defendants'

1 documents and ESI.

2 (2) The wholesalers' futility arguments are
3 premature. This Court's role is to decide if the requested
4 discovery is relevant to claims and defenses in the complaint
5 pursuant to Rule 26. This Court's role is not to decide
6 defendants' motion to dismiss. If the Court denied discovery
7 every time a defendant argued plaintiffs' claims were futile
8 or that its motion to dismiss would be granted, then no
9 discovery would be produced and cases would grind to a halt.

10 This is plainly unacceptable.

11 (3) As to defendants' arguments that the requested
12 discovery is highly proprietary and trade secret, this is not
13 a good ground to deny plaintiffs' relevant core discovery.
14 The wholesalers' concerns about protecting the distribution of
15 their confidential information are adequately addressed by the
16 provisions in the Discovery Confidentiality Order the parties
17 negotiated and the Court entered.

18 (4) As to the wholesalers' proportionality and unduly
19 burdensome argument, the Court finds that plaintiffs have not
20 satisfied their burden to bar the requested discovery on this
21 ground. The requested tracing document discovery is relevant
22 to critical core issues in the case. On the other hand, the
23 wholesalers have not made a persuasive case that the requested
24 discovery is unduly burdensome or not reasonably accessible.
25 Instead, the wholesalers merely present conclusory, general

1 statements that are not persuasive.

2 For example, Tara Abraham from McKesson says at
3 Paragraph 47 of her declaration that it will "take a large
4 amount of time at great expense" to respond to plaintiffs'
5 discovery.

6 Brett Harrop, H-A-R-R-O-P, from McKesson, says it
7 will be "burdensome, expensive, and time-consuming" to
8 generate the report plaintiffs want. Paragraph 22.

9 Matthew Sample from AmerisourceBergen says, at
10 Paragraph 15 of his declaration, that it would require a
11 significant expenditure of time and effort and would be
12 extremely burdensome to respond to plaintiffs' discovery.

13 These types of general and conclusory statements do
14 not and will not serve to bar plaintiffs from obtaining
15 relevant core discovery.

16 One last point in this regard. Tara Abraham from
17 McKesson avers it would be burdensome to respond to
18 plaintiffs' discovery since the company only has one person to
19 prepare a sales report from its BHP system. This argument is,
20 and, if made in the future, will be soundly rejected.

21 All parties in the case must devote sufficient
22 resources to adequately and timely respond to legitimate
23 discovery requests. The Court and litigants will not be held
24 hostage if a party unilaterally decides to slow walk
25 discovery.

1 The Court addressed the same issue in its decision in
2 *Constantino v. Atlantic City*, 152 F. Supp. 3d 311, District of
3 New Jersey 2015, where a police department argued it did not
4 have to produce relevant discovery because of limited
5 available staff to do photocopying.

6 The Court wrote in that case, "It is unacceptable for
7 a defendant to avoid legitimate discovery because it does not
8 devote reasonable resources to defending a case." *Id.* at page
9 328.

10 What the Court said in *Constantino* is equally
11 applicable here.

12 In addition, the Court rejects defendants' request
13 that plaintiffs share in the cost of producing the requested
14 discovery. Far from being marginally relevant, as defendants'
15 argue, the requested tracing discovery goes to issues at the
16 heart of the case. Apart from this, the requested discovery
17 is not unreasonable or unduly burdensome. Thus, defendants'
18 request for cost sharing is denied.

19 The Court now turns to plaintiffs' request for sales
20 and cost data from the wholesalers.

21 Plaintiffs want to know the gross and net prices paid
22 for the valsartan the wholesalers bought and the gross and net
23 prices they sold the valsartan to downstream purchasers.
24 Plaintiffs argue this discovery is relevant to their
25 disgorgement and unjust enrichment claims. They also argue

1 the discovery is relevant to motive and intent, which the
2 Court completely discounts.

3 The wholesalers argue the requested discovery is
4 irrelevant, would be unduly burdensome to produce, and
5 involves extremely confidential and trade secret information.

6 As to this discovery request, the Court declines to
7 decide at this time if the requested discovery is relevant
8 within the meaning of Rule 26. Instead, the Court finds that
9 since the requested discovery is not relevant to a core issue
10 in the case, and the viability of plaintiffs' profit and
11 disgorgement claims will be decided when the Court rules on
12 defendants' motions to dismiss, there is no pressing need for
13 the wholesaler defendants to produce the requested sales and
14 profit information now. From the beginning of the case, the
15 Court has said it wants the parties to focus on the core
16 issues. For example, was defendants' valsartan contaminated?
17 With what? How much? When did this occur? Did plaintiffs
18 ingest contaminated valsartan? Plaintiffs' request for profit
19 and sales discovery, while ultimately may be important and
20 relevant, is not directed to these core issues. The Court,
21 therefore, defers this discovery for a later time in the case.
22 The Court and parties can revisit plaintiffs' request after
23 defendants' motions to dismiss are decided.

24 Turning to the retailer defendants, it appears there
25 are two main points of contention: One, these defendants

1 object to producing upstream cost data, i.e., what the
2 retailers paid for their valsartan; and two, certain
3 downstream pricing data, namely, what insurers paid to the
4 pharmacies for valsartan.

5 The retailer defendants argue the requested discovery
6 is not relevant to any valid claim against them and that the
7 burden of producing the discovery is disproportionate to its
8 importance.

9 Plaintiffs argue the requested cost discovery is
10 relevant to their disgorgement and unjust enrichment claims.
11 In addition, plaintiffs argue they need the requested
12 discovery to determine these defendants' profits.

13 As to the second issue in dispute, what the
14 third-party payors paid for valsartan, the retailers argue the
15 requested discovery is irrelevant, since the TPPs have not
16 asserted a claim against them, only the consumers.

17 In opposition, plaintiffs argue one filed case
18 asserts a claim by a TPP against the retailers and plaintiffs
19 may amend their master complaint. Plaintiffs also argue they
20 need to know what the TPPs paid the retailer defendants in
21 order to know how much these defendants made in sales.

22 Plaintiffs argue they need to know how much the TPPs paid the
23 retailers in order to calculate the damages recoverable from
24 the other defendants.

25 As to this requested profit discovery, the Court

1 rules the same way it did when the discovery was requested
2 from the wholesalers. To repeat, this discovery is not
3 directed to the core issues in the case and will be the
4 subject of defendants' motions to dismiss. Thus, the Court
5 defers this discovery for a future date which, in all
6 likelihood, will be after defendants' motions to dismiss are
7 decided.

8 The Court notes that it sees absolutely no prejudice
9 to plaintiffs from the deferral of the ruling on the relevance
10 of the requested discovery. At the appropriate time, the
11 Court can address the issue. And, if genuinely needed,
12 whether to prove liability, class certification, or damages,
13 the Court will address the issue. The Court is convinced that
14 the parties can better spend their time, and the more
15 productive use of the parties' time will be spent on focusing
16 on core issues rather than the disgorgement of profits and
17 unjust enrichment claims that will be the subject of motions
18 to dismiss to be decided.

19 In sum, therefore, the Court will grant plaintiffs'
20 request that the wholesalers have to respond to requests for
21 production 1 and 3.

22 The Court will deny without prejudice plaintiffs'
23 request that the wholesaler defendants respond to requests for
24 production 2 and 4.

25 As to the retailers, the Court's ruling is the same

1 as the Court ruled with regard to requests for production 2
2 and 4.

3 The Court's order will also state that the final
4 version of the wholesaler and retailer fact sheets shall be
5 served by Thursday.

6 The Court's order will provide that the wholesalers
7 and retailers have to respond within 30 days.

8 In addition, the Court will add to the order a
9 provision or provisions that was in the order that the Court
10 cited to from the *Androgel Antitrust Litigation*, 2012 Westlaw
11 12895205, Northern District of Georgia, March 29, 2012. In
12 that case, the Court ordered the same three wholesalers to
13 produce all purchase and sales data regarding certain drugs,
14 essentially, the same or similar order to what this Court is
15 doing, with two additional provisions which will be included
16 in this order.

17 The wholesalers are ordered to provide a written
18 description of the data and data fields that they supply; and
19 the wholesaler defendants will be ordered to undertake
20 reasonable efforts to address the plaintiffs' reasonable
21 questions concerning the data that was -- that will be
22 produced.

23 Counsel, that completes the Court's oral opinion. I
24 don't anticipate that an order will be entered today, but
25 you'll see the Court's order tomorrow or the day after.

1 While we're together, are there any other issues or
2 matters we need to address?

3 MS. JOHNSTON: Yes, your Honor. This is Sarah
4 Johnston for retailers. I just wanted to clarify a couple
5 things I heard at the end of the oral order.

6 The first was that, as I heard it, I think you said
7 that the final versions of the fact sheets would be served by
8 Thursday, and I wanted to confirm if that was RFPs -- the Rule
9 34 requests and not the fact sheets.

10 THE COURT: You're absolutely right, Ms. Johnston. I
11 misspoke. I was only referring to the requests for
12 production.

13 MS. JOHNSTON: Okay. And then, also, I wanted to
14 make sure that we were following the same process that was in
15 place for the manufacturing defendants, that is, when you say
16 serving those, are we filing those with the Court, with
17 service to follow to defendants, or did you have a different
18 process in mind?

19 THE COURT: Serve them on the Court on Thursday. I
20 will enter an order approving the requests for production,
21 indicating that they have to be answered within 30 days, with
22 no objection. Just like we did with the manufacturers.

23 MS. JOHNSTON: Sure. And the -- oh, I'm sorry. Go
24 ahead.

25 THE COURT: The reason the wholesalers and retailers

1 have 30 days to respond is because this discussion has gone on
2 for, in the Court's view, respectfully, an unreasonable amount
3 of time. I think that this whole process could have been
4 advanced by months if there was exemplar or sample documents
5 produced. They weren't produced. The Court didn't order them
6 to be produced, although that was defendants' preference. So
7 I'm not going to let that delay the progress of this case.

8 We had a hiccup in the case, understandably, due to
9 the virus, perfectly reasonable, we closed things down, but
10 it's time to start moving things, and that's why the Court is
11 going to insist that they be responded to within 30 days.

12 MS. JOHNSTON: Understood, your Honor.

13 And because this is a general set of discovery, we
14 had always contemplated that there were going to need to be
15 individualized responses because certain data is kept by
16 certain retailers and not by others, and so we understand that
17 a written response clarifying what will ultimately be produced
18 is warranted. But I do want to clarify that the Court is
19 contemplating a written response within 30 days and not a
20 full-scale document production.

21 THE COURT: No, that's not correct. The Court is
22 anticipating a written response and a document production.
23 The wholesalers and retailers have had these requests for
24 months. They've been on notice of these requests. They have
25 the resources to produce the documents. 30 days, response in

1 writing, no objections, with the responsive documents and ESI.

2 MS. JOHNSTON: Your Honor, I want to clarify the
3 understanding in what we've discussed with plaintiffs has not
4 contemplated that documents would be produced within 30 days,
5 namely because we have repeated time and time again to
6 plaintiffs that unless we have a discovery vehicle to prompt
7 the collection, review, production of documents, it's not --
8 we don't have a timeline that is triggered by that.

9 I would propose that we can provide written responses
10 and, again, rolling collections -- or rolling productions as
11 soon as possible, but I don't think that it's -- it's feasible
12 for the retailers to complete their production, particularly
13 in light of the fact that, you know, while this has been a
14 process that's been ongoing for the last several months,
15 the -- the hiccup was a substantial business interruption for
16 many of the retailers and other downstream defendants, such
17 that the idea that we could get documents collected and
18 produced in such a short order is more difficult than it has
19 been in the past, and I would also say that, as the Court may
20 remember, the hearing on the macro discovery issues was
21 continued twice because of the difficulty with obtaining the
22 necessary evidence to support our arguments, in light of the
23 COVID pandemic, and so I would -- I would offer to the Court
24 that the same difficulties still exist with these companies,
25 and have existed for the last several months. So, you know,

1 assuming the understanding that documents were to be collected
2 and produced while we were waiting for final discovery
3 documents, you know, understanding that to be the Court's
4 expectation, the reality is that the difficulty alone in
5 finding declarants in order to put the evidence before the
6 Court to support our macro briefing was a challenge in and of
7 itself, and I don't think that the process of collecting
8 documents either would have been easier during that period or
9 is frankly going to be any less of a challenge now. So while
10 I think that we can move forward and begin the process of
11 getting these documents ready to produce, 30 days is going to
12 put nearly all, if not all, of the retailers in a pretty dire
13 position.

14 MS. DAVIS: Your Honor, D'Lesli Davis for
15 wholesalers.

16 We would join in the retailers' concerns about that
17 and would request sort of a 60-day period, at least, to begin
18 what would be a good-faith rolling production.

19 THE COURT: Counsel, the Court said what it said.
20 The order is going to state what the Court indicated, for the
21 reasons that the Court already stated.

22 Respectfully, the Court has been overindulgent in
23 accommodating interests in the case, pushed deadlines back.
24 It is what it is.

25 In the Court's view, your clients have been on notice

1 for months about what was at issue. There was a small
2 smidgeon of information that was the subject of this macro
3 dispute. There is no reason they couldn't have pulled
4 together whatever other information plaintiffs requested.
5 Your clients decided not to produce samples or exemplars which
6 would have advanced this process by months. That was its
7 decision. We'll live with it.

8 I have nothing to add to the Court's explanation.
9 The order is going to state 30 days to respond in writing and
10 produce the responsive documents, with no objection.

11 Anything else, counsel, we need to address?

12 MS. DAVIS: Not from the wholesalers, your Honor.

13 THE COURT: I thank everyone for your excellent
14 briefs and oral argument.

15 Like I said, I don't think you're going to get the
16 Court's order today, but, hopefully, you'll get it tomorrow,
17 and if not tomorrow, the day after. But I'll look for the
18 final requests for production on Thursday, enter it, and then
19 we'll turn our attention to finishing the other issues we need
20 to finish. We need to finish, I guess, the manufacturers'
21 fact sheets; we need to finish the fact sheets for the
22 wholesalers and retailers. And then I think when we get that
23 out of the way, you can focus on producing your documents and
24 ESI, and then we'll turn to getting ready for the depositions
25 in the case.

1 For the people on my team who are on the phone, can I
2 ask you to call back to this number in ten minutes? There are
3 certain issues I need to talk to you about.

4 Counsel, thank you very much. I appreciate your
5 indulgence, this went pretty long, and we're adjourned.

6 (The proceedings concluded at 4:42 p.m.)

7 - - - - -

8

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled matter.

11

12 /S/ Carol Farrell, NJ-CRCR, FCRR, RDR, CRR, RMR, CRC, CRI
13 Court Reporter/Transcriber

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15 July 09, 2020
Date

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